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No. 98-678-CFX

Title: Los Angeles Police Department, Petitioner  
v.  
United Reporting Publishing Corporation

Docketed:  
October 26, 1998

Court: United States Court of Appeals for  
the Ninth Circuit

Entry Date

Proceedings and Orders

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Sep 11 1998	Application (98A231) to extend the time to file a petition for a writ of certiorari from September 23, 1998 to November 22, 1998, submitted to Justice O'Connor.
Sep 15 1998	Application (98A231) granted by Justice O'Connor extending the time to file until October 23, 1998.
Oct 23 1998	Petition for writ of certiorari filed. (Response due December 21, 1998)
Nov 17 1998	Order extending time to file response to petition until December 15, 1998.
Dec 11 1998	Order further extending time to file response to petition until December 21, 1998.
Dec 21 1998	Brief of respondent United Reporting Publishing Corp. in opposition filed.
Jan 6 1999	DISTRIBUTED. January 22, 1999
Jan 6 1999	Reply brief of petitioner Los Angeles Police Department filed.
Jan 12 1999	Letter from counsel for the petitioner received and distributed.
Jan 25 1999	Petition GRANTED. SET FOR ARGUMENT October 13, 1999. *****
Feb 6 1999	Order extending time to file brief of petitioner on the merits until April 12, 1999.
Mar 15 1999	Joint appendix filed.
Mar 22 1999	Order further extending time to file brief of petitioner on the merits until April 30, 1999.
Apr 30 1999	Brief of petitioner Los Angeles Police Department filed.
Apr 30 1999	Brief amici curiae of New York et al. filed.
Apr 30 1999	Brief amicus curiae of United States filed.
May 12 1999	Order extending time for respondent to file brief on the merits until July 9, 1999.
Jun 18 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jun 24 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jun 24 1999	Order further extending time to file respondent's brief on the merits to and including July 20, 1999.
Jul 19 1999	Brief amicus curiae of Newsletter Publishers Association filed.
Jul 20 1999	Brief amici curiae of Reporters Committee for Freedom of the Press, et al. filed.
Jul 20 1999	Brief amici curiae of Individual Reference Services Group, et al. filed.
Jul 20 1999	Brief of respondent United Reporting Publishing Corp. filed.

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Jul 20 1999	LODGING consisting of ten copies of appendix material submitted by counsel for the respondent.
Jul 20 1999	Brief amicus curiae of Investigative Reporters and Editors, Inc. filed.
Jul 20 1999	Brief amicus curiae of The Direct Marketing Association filed.
Jul 20 1999	Brief amicus curiae of Washington Legal Foundation filed.
Aug 23 1999	Reply brief of petitioner Los Angeles Police Department filed.
Aug 26 1999	CIRCULATED.
Sep 29 1999	Record filed.
Oct 13 1999	ARGUED.



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No. 98-\_\_\_\_\_

OFFICE OF THE CLERK

IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1998

Los Angeles Police Department,  
*Petitioner,*

v.

United Reporting Publishing Corp.,  
*Respondent.*

Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

The Ninth Circuit in this case declared unconstitutional Cal. Gov't Code 6254(f)(3), under which persons may receive the addresses of arrestees and crime victims "for a scholarly, journalistic, political, or governmental purpose, [or] for investigation purposes by a licensed private investigator," but only if they agree not to use the information "directly or indirectly to sell a product or service." The Ninth Circuit invalidated Section 6254(f)(3) on the ground that the statute violates the commercial speech rights of persons and businesses that wish to sell address information to lawyers, insurance companies, and others. There is a widely acknowledged and irreconcilable conflict in the lower courts on the issue: the Fifth and Eleventh Circuits have struck down the parallel statutes of Texas and Georgia; the Tenth Circuit, Louisiana Supreme Court, and South Carolina Supreme Court have reached the opposite conclusion.

The question presented is whether the government violates the First Amendment when it releases records but forbids their commercial use?

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OCTOBER TERM, 1998

Los Angeles Police Department,  
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Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

**PETITION FOR A WRIT OF CERTIORARI**

The Los Angeles Police Department respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

**OPINIONS BELOW**

The district court's opinion (Pet. App. 9a-23a (per Brewster, J.)) is published at 946 F. Supp. 822. The Ninth Circuit's opinion (Pet. App. 24a-36a (per O'Scannlain, J., joined by Farris and Fernandez, JJ.)) is published at 146 F.3d 1133.

## JURISDICTION

The Ninth Circuit entered its judgment on June 25, 1998. On September 15, 1998, Justice O'Connor extended the time to file this Petition to and including October 23, 1998. Application No. A-231. Petitioner invokes the jurisdiction of this Court under 28 USC 1254(1).

Pursuant to S. Ct. R. 14(e)(v), Petitioner notes that, because this action calls into question the constitutionality of a state statute, 28 USC 2403(b) may apply. In compliance with S. Ct. R. 29.4(c), this Petition is being served on the Attorney General of the State of California. Although the Ninth Circuit did not certify to the State Attorney General the fact that the constitutionality of a state statute was drawn into question (*see* S. Ct. R. 29.4(c)), the State Attorney General (i) was a party to the district court proceedings, (ii) is subject to the injunction entered by the district court, and (iii) declined to appeal the district court's ruling to the Ninth Circuit.

## STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The statute relevant to this Petition, Cal. Gov't Code 6254(f)(3) is reprinted in full in the Appendix (6a-8a), but is reproduced here in relevant part:

[S]tate and local law enforcement agencies shall make public the following information . . . .

(3) [T]he current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly,

journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator . . . , except that the address of the victim of [certain specified crimes] shall remain confidential. Address information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury.

## STATEMENT

1. Law enforcement officials around the country collect a wide variety of information in the ordinary course of their duties, including the addresses of crime victims and of suspects who are arrested. In 1996, California amended its public records laws to limit carefully the disclosure of this address information. Cal. Gov't Code 6254(f)(3) now provides that addresses of arrestees and crime victims shall not be publicly available but instead may be disclosed only "for a scholarly, journalistic, political, or governmental purpose, or . . . for investigation purposes by a licensed private investigator." Any recipient of addresses under this provision must furthermore certify that the information will "not be used directly or indirectly to sell a product or service." *Id.*

By providing for the release of various government records to the press and others *so long as* those records are not used for commercial or solicitation purposes, Section 6254(f)(3) mirrors more than eighty statutes adopted by the federal government and thirty-eight different states. Pet. App. 1a-5a. Thirteen states, including California, specifically apply this restriction to some or all police report information. *Id.* 1a. Statutes in ten states prohibit the commercial use of not just police reports but most government records. *Id.* Dozens of other federal and state statutes similarly prohibit the commercial use of several other classes of government records, including election and public assistance records. *Id.* 3a-4a.

2. Prior to the enactment of Section 6254(f)(3), Respondent United Reporting Publishing Corporation sold lists of the names and addresses of arrestees to attorneys, insurance companies, driving schools, and others. Pet. App. 11a. Upon the statute's enactment, Respondent sued Petitioner Los Angeles Police Department and others in federal district court alleging that the statute would prevent it from lawfully selling address information. Respondent alleged, *inter alia*, that the statute was facially invalid under the First Amendment because it infringed upon Respondent's commercial speech right to disseminate this information. *Id.*

The district court agreed and permanently enjoined the enforcement of Section 6254(f)(3). The district court began by acknowledging not only that "[c]ourts have uniformly" concluded that "there is no constitutional right, and specifically no First Amendment right, of access to all governmental records," but also that "[t]he First Amendment directly protects the expression of information already obtained; it does not guarantee access to the sources of information." Pet. App. 12a-13a. The court also recognized that Section 6254(f)(3) prohibits only the acquisition of a government record, not any communication by Respondent. The district court therefore acknowledged that California "could constitutionally prevent everyone from having access to this information." *Id.* 14a.

The district court nonetheless found that the statute implicates the First Amendment because it "makes all arrestee information public, but then limits access only to those who plan to use arrestee addresses in commercial speech." *Id.* 14a.<sup>1</sup>

<sup>1</sup> The district court did not provide any explanation for its statement that Section 6254(f)(3) prohibits only the *commercial* use of address information. The plain text of the statute provides that address information shall be released only "for a scholarly, journalistic, political, or governmental purpose, [or] for investigation purposes by a licensed private investigator." Respondent has asserted that the categories of permissible recipients set forth in Section 6254(f)(3) are so vague that, in effect, only commercial users are excluded. *E.g.*, Resp. C.A. Br. at 3. Respondent has offered no authority or explanation for this claim, and we submit that the terms of Section 6254(f)(3) are unambiguous. To take the simplest case, there is no question that a member of the general public engaged in curiosity seeking is prohibited by Section 6254(f)(3) from receiving address information. In any

Based on its view that Section 6254(f)(3) implicates Respondent's commercial speech rights, the court analyzed the statute under the four-part test set forth by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980):

[1] At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. [3] If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

*Id.* at 566. The district court found the first two *Central Hudson* prongs to be satisfied in this case: the parties did not dispute that Respondent's sales of arrestee information were lawful and not misleading; and the court found that California has a substantial interest in, *inter alia*, protecting the privacy of arrestees by restricting the dissemination of address information. Pet. App. 17a.

Regarding the third *Central Hudson* prong, the district court recognized that the courts which have "dealt with statutes substantially similar to Cal. Gov. Code § 6254(f) split on whether the statutes materially advanced the state's interest in protecting the privacy of its citizens." Pet. App. 19a. For example, in *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, *cert. denied*, 513 U.S. 1044 (1994), the Tenth Circuit upheld Colorado's parallel statute on the ground that the state's interest in protecting privacy is directly advanced when the State no longer allows access to the names and addresses of arrestees. Pet. App. 19a (citing *Lanphere*, 21 F.3d at 1515).

event, when as here the plaintiff challenges the facial validity of a statute, courts properly construe the statute to *avoid* constitutional concerns, not create them. *Ohio v. Akron Ctr. For Reproductive Health*, 497 U.S. 502, 514 (1990).



The district court in this case considered but expressly rejected the Tenth Circuit's view, reasoning that Section 6254(f)(3) "still allows [the individual's] name and address to be published in the newspapers, broadcast on television, and/or obtained by an employer or even an enemy. These are potentially much more pervasive invasions of privacy, yet the statute allows them." *Id.* 21a. The district court also doubted that Respondent's conduct led to unwarranted invasions on individual privacy: "If [the recipients] don't like the solicitation, they can simply throw it away." *Id.* On this basis, the district court concluded that Section 6254(f)(3) fails the *Central Hudson* inquiry and is unconstitutional. Pet. App. 22a.<sup>2</sup>

3. On Petitioner's appeal, the Ninth Circuit affirmed, agreeing with the district court that Section 6254(f)(3) fails to advance materially the state's interest in privacy. Pet. App. 24a. The court reasoned from its earlier decision in *Valley Broadcasting Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1050 (1998). *Valley Broadcasting* invalidated a federal ban on broadcast advertisements of casino gambling on the ground that statutory exceptions for other forms of gaming advertisements rendered the statute ineffectual. According to the opinion below, "Likewise here, we are compelled to hold that the numerous exceptions to § 6254(f)(3) for journalistic, scholarly, political, governmental, and investigative purposes render the statute unconstitutional under the First Amendment." *Id.* at 35a. The court continued:

It is not rational for a statute which purports to advance the governmental interest in protecting the privacy of arrestees to allow the names and addresses

<sup>2</sup> The district court also raised a concern that the statute may have "been intended to prevent arrestees from obtaining counsel because law enforcement agencies find it easier to deal with arrestees who are not represented by counsel." Pet. App. 21a. This is an unfair characterization of the statute, which equally restricts the release of the addresses of crime victims. In any event, the Ninth Circuit did not echo this concern on appeal, and it therefore did not play any part in the judgment below.

of the same to be published in any newspaper, article, or magazine in the country so long as the information is not used for commercial purposes. Having one's name, crime, and address printed in the local paper is a far greater affront to privacy than receiving a letter from an attorney, substance abuse counselor, or driving school eager to help one overcome his present difficulties (for a fee, naturally).

*Id.*

The Ninth Circuit recognized that the Tenth Circuit had upheld Colorado's parallel statute in the *Lanphere* case. Pet. App. 33a-34a & n.4. The Ninth Circuit concluded, however, that because the Tenth Circuit's analysis conflicted with Supreme Court precedent and with the Ninth Circuit's own decision in *Valley Broadcasting*, "[t]he district court was correct not to follow *Lanphere*." *Id.*

This Petition followed.

## REASONS FOR GRANTING THE WRIT

### I. THE CIRCUITS AND STATE SUPREME COURTS ARE IRRECONCILABLY DIVIDED ON THIS FREQUENTLY RECURRING QUESTION OF FEDERAL LAW.

1. This Court should grant certiorari to resolve the well-recognized division in the lower courts over whether, under the First Amendment, the government may release police reports for journalistic and other purposes but not for commercial use. Eighteen such statutes exist in thirteen states. Pet. App. 1a-2a. Eleven such statutes have been challenged on First Amendment grounds. *Id.*

The split in the appellate courts on the constitutionality of statutes prohibiting the commercial use of police report information is three to three. The Tenth Circuit, Louisiana Supreme Court, and South Carolina Supreme Court have found such measures to be constitutional. *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir.), *cert. denied*, 513 U.S.

1044 (1994); *DeSalvo v. Louisiana*, 624 So. 2d 897 (La. 1993), *cert. denied*, 510 U.S. 1117 (1994); *Walker v. South Carolina Department of Highways & Public Transportation*, 466 S.E.2d 346 (S.C. 1995). On the other hand, the Fifth, Ninth, and Eleventh Circuits have struck down the statutes of Texas, California, and Georgia. *Pet. App. 24a*; *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994); *Innovative Database Systems v. Morales*, 990 F.2d 217 (5th Cir. 1993). District courts have struck down separate Georgia and Texas statutes, as well as the statutes of Florida, Kentucky, and New Mexico.<sup>3</sup> *Statewide Detective Agency v. Miller*, No. 96-cv-1033 (WBH), Order (N.D. Ga. Aug. 12, 1998); *Babkes v. Satz*, 944 F. Supp. 909 (S.D. Fla. 1996); *Amelkin v. Commissioner*, 936 F. Supp. 428 (W.D. Ky. 1996); *Moore v. Morales*, 843 F. Supp. 1124 (S.D. Tex. 1994), *on appeal of separate issue, aff'd in part and rev'd in part*, 63 F.3d 358 (5th Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996); *LaSalle v. Udell*, Case No. 94-0404-M, Unpublished Opinion and Order (D.N.M. Feb. 16, 1996).<sup>4</sup>

2. In *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, the Tenth Circuit sustained a Colorado statute providing that law enforcement records "and the names, addresses, telephone numbers, and other information in such records shall not be used by any person for the purpose of soliciting business for pecuniary gain." Unlike the Ninth Circuit, which subjected

<sup>3</sup> The Oregon Court of Appeals invalidated that state's statute based on the free speech provision of the state Constitution. *Zackheim v. Forbes*, 895 P.2d 793 (1995). The statute subsequently was repealed.

<sup>4</sup> Petitioner notes for the Court's benefit a few additional facts about the history and procedural posture of these district court cases. First, the district court's *Amelkin* decision, which invalidated the Kentucky statute, currently is on appeal to the Sixth Circuit, which has twice previously invalidated injunctions against the same statute's enforcement for failure to follow FRCP 65. *Northern Kentucky Chiropractic v. Ramey*, No. 95-5645, 1997 U.S. App. LEXIS 1734 (6th Cir. Jan. 29, 1997); *Amelkin v. McClure*, No. 94-6161, 1996 U.S. App. LEXIS 1414 (6th Cir. Jan. 9, 1996). Second, in an interlocutory appeal of *Statewide Detective Agency v. Miller*, the Eleventh Circuit sustained a preliminary injunction entered by the district court against the enforcement of the Georgia statute. 115 F.3d 904 (1997). Third, the Texas statute at issue in the *Moore v. Morales* case (Tex. Civ. Stat. Ann. Art. 6701(d), § 45(a)) subsequently was repealed.

Cal. Gov't Code § 6254(f)(3) to stringent review as a ban on commercial speech, the Tenth Circuit concluded that it was inappropriate to require a strict "fit" between the Colorado statute's means and ends because the state "has not completely banned direct mail solicitation for pecuniary gain of any particular group. The State has instead established an indirect barrier to commercial speech by not making certain records available for that purpose." *Id.* at 1515. The Tenth Circuit also expressly rejected the contention, which is central to the Ninth Circuit's ruling in this case, that various exceptions render the statute ineffectual:

Plaintiffs contend that the State's asserted privacy interest is only chimerical because the identity of those charged may be available through other sources such as local newspapers. However, even if the information is available to some degree through other sources, the state's interest in not aiding in the dissemination of the information for commercial purposes remains. We presume that plaintiffs would not be involved in this litigation if the information they seek is so widely available that the privacy of the accused is no longer at issue.

*Id.* at 1514.

The district court and Ninth Circuit in this case both openly acknowledged a square conflict with the Tenth Circuit's decision in *Lanphere*. *Pet. App. 19a, 33a-34a*. Prior to the ruling in this case, the conflict between *Lanphere* and the Fifth and Eleventh Circuits' decisions in *Speer* and *Innovative Database Systems* was widely recognized. As the district court for the Western District of Kentucky explained in analyzing that state's commercial-use prohibition:

A close question is presented to the Court as to the constitutionality of the statutes challenged by the plaintiffs. There is a conflict in the decisions of the Eleventh Circuit and the Tenth Circuit as evidenced by the decisions in *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994), and *Lanphere & Urbaniak v. State*



of *Colorado*, 21 F.3d 1508 (10th Cir. 1994). In addition, the decisions in *Moore v. Morales*, 843 F. Supp. 1124 (S.D. Texas 1994), and *Innovative Database Systems v. Morales*, 990 F.2d 217 (5th Cir. 1993), hold that Texas may not prohibit chiropractors or attorneys from receiving access to motor vehicle accident reports on the grounds that they will use the information for financial gain.

*Amelkin v. Commissioner*, 936 F. Supp. 428, 429 (W.D. Ky. 1996). A federal court reviewing one of Georgia's several commercial-use prohibitions similarly has recognized that the Eleventh Circuit's *Speer* ruling "is in conflict with the Tenth Circuit's finding that the Colorado statute banning lawyers but not the media from accessing certain government records advanced a substantial interest in protecting the privacy of the people listed in the protected government records." *Speer v. Miller*, 864 F. Supp. 1294, 1301 (N.D. Ga. 1994). And, in a challenge to one of Florida's commercial-use prohibitions, the state similarly "urge[d] the Court to follow *Lanphere & Urbaniak v. Colorado*," but the court refused, explaining that "[t]his argument ignores that *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994) is binding precedent on this Court." *Babkes v. Satz*, 944 F. Supp. 909, 913 n.4 (S.D. Fla. 1996).

3. The Ninth Circuit's decision in this case also is in direct conflict with rulings of two state supreme courts. *DeSalvo v. Louisiana*, 624 So. 2d 897 (La. 1993), *cert. denied*, 510 U.S. 1117 (1994), sustained a statute that permitted the release of accident reports to parties involved in the accident, insurers, driving records contractors, and the press, but not to businesses for commercial purposes. *Id.* at 898. The Louisiana Supreme Court applied a "less stringent test" in reviewing the statute because the commercial-use prohibition only "indirectly results in a stricture upon the flow of information or ideas because of a government measure seeking a goal independent of the communicative content or impact of the speech." *Id.* at 900. Under this test, the court sustained the statute because it "narrowly focuses on the state's substantial interest in protecting the right of privacy of individuals. . . . The plenary

power of the legislature, in exercising the police power of the state, to make all laws necessary and proper to that end is broad and sweeping." *Id.* at 901 (citing *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) ("The State's interest in protecting the well being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.")); *see also Northern Kentucky Chiropractic v. Ramey*, No. 95-5645, 1997 U.S. App. LEXIS 1734 (6th Cir. Jan. 29, 1997) (Nelson, J., concurring) (recognizing that *DeSalvo* and *Lanphere* conflict with decisions of Fifth and Eleventh Circuits).

In *Walker v. South Carolina Department of Highways & Public Transportation*, 466 S.E.2d 346 (1995), the South Carolina Supreme Court similarly sustained a statute prohibiting the release of police accident reports "for commercial solicitation purposes." The court concluded that the statute did not implicate the First Amendment because it "regulates only access to information; it in no way inhibits [the plaintiff's] exercise of her free speech rights in the form of direct mail to prospective clients." *Id.* at 348. Moreover, citing the Tenth Circuit's decision in *Lanphere*, the court made clear that it would sustain the statute under a First Amendment analysis: "Even if the first amendment applied, the State's interest in protecting the privacy of victims is sufficient to justify the statute's restriction on commercial solicitation." *Id.*

3. Certiorari also is warranted because the decision below directly implicates two other important conflicts in the lower courts. First, the circuits disagree over whether restrictions on commercial speech are invalid if they contain exceptions permitting the publication of similar information in other forms. The Ninth Circuit in *Valley Broadcasting Co. v. United States*, 107 F.3d 1328, *cert. denied*, 118 S. Ct. 1050 (1998), invalidated a federal ban on casino gambling because the statute permits other forms of gaming advertisements. *See supra* at 3. The Fifth Circuit, however, recently upheld the same statute, expressly rejecting the stringent test applied by the Ninth Circuit. *Greater New Orleans Broadcasting Ass'n v. United States*, 149 F.3d 334, *pet. for cert. pending*, No. 98-387 (Sept. 2, 1998). That conflict applies fully here. Applying

*Valley Broadcasting*, the Ninth Circuit in this case invalidated Section 6254(f)(3) because the statute contains exceptions under which the state provides address information to the press, scholars, and investigators. Pet. App. 35a. The Tenth Circuit and Louisiana and South Carolina Supreme Courts, by contrast, have refused to review such exceptions stringently and have concluded that the statutes sufficiently advance the government's interest in protecting individual privacy.

Second, the lower courts have divided over the constitutionality of a closely related commercial-use prohibition involving campaign records. The federal government and many states permit the release of campaign contribution records, but only so long as the recipient agrees not to use the information for commercial or solicitation purposes. Pet. App. 3a-4a. The *en banc* D.C. Circuit upheld the federal statute in *FEC v. International Funding Institute*, 969 F.2d 1110, cert. denied, 506 U.S. 1001 (1992), despite the fact that "[t]he information in the report submitted by a political committee may freely be copied, published, and with one exception, used in any way."<sup>5</sup> *Id.* at 1117. The Supreme Court of Missouri, however, invalidated that state's parallel statute in *Ryan v. Kirkpatrick*, 669 S.W.2d 215 (1984) (en banc), and the Second Circuit has narrowly construed the federal provision in light of serious concerns about its constitutionality, *FEC v. Political Contributions Data*, 943 F.2d 190 (1991).

4. The extraordinary importance of this question to the administration of state and federal public records law is beyond question. Thirteen states prohibit the use of police report information for commercial purposes. Pet. App. 1a-2a. Moreover, the principle at stake has far greater application because so many state and federal laws permit the release of

<sup>5</sup> Then-Judge Ruth Bader Ginsburg joined the Court's opinion but also concurred separately to note that the commercial-use restriction was valid because it does not have "the effect of favoring a particular speaker or set of ideas." 969 F.2d at 1119. Moreover, the statute permits solicitors to "contact[] the very individuals whose names appear on the FEC lists they inspect (so long as the solicitees' names are obtained from an independent source)." *Id.*

government records but forbid their use for commercial purposes. Campaign contribution statutes of the kind at issue in the *International Funding Institute* and *Ryan* cases are just one example.<sup>6</sup> In total, the federal government and thirty-eight different states prohibit the use of various government records for commercial purposes through more than *eighty* different statutes. Pet. App. 1a-5a.

5. No purpose is served by permitting the conflict to percolate further in the lower courts, which already have addressed the constitutionality of *eleven* indistinguishable statutes that prohibit the commercial use of police report information. Pet. App. 1a-2a. The question has been addressed by four different federal courts of appeals and two state supreme courts, which have sustained the statutes of Colorado, Louisiana, and South Carolina, but invalidated those of California, Georgia, and Texas. *See supra*. Only a decision by this Court can produce a consistent and coherent application of the First Amendment regarding this important and recurring issue.

## II. THE DECISION BELOW IS ERRONEOUS.

Certiorari also is warranted because the ruling below conflicts with this Court's First Amendment precedents. The constitutionality of Section 6254(f)(3) can be analyzed under the four-prong test set forth by this Court in *Central Hudson*. But any such analysis must account for the state's wide discretion in releasing government records and also the extremely indirect burden on Respondent's speech that Section 6254(f)(3) imposes. The Ninth Circuit, however, analyzed Section 6254(f)(3) as if it were a complete prohibition on

<sup>6</sup> For example, two First Amendment challenges recently have been brought against a provision of the Driver's Privacy Protection Act that permits the release of state driver's license information, but not for commercial purposes. 18 U.S.C. §§ 2721-22; *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998) (disposing of case on alternative Tenth Amendment ground); *Loving v. United States*, No. 97-6060, 1997 U.S. App. LEXIS 23639 (10th Cir. Sept. 8, 1997) (disposing of case on standing grounds).



Respondent's speech. In so extending the protections afforded to commercial speech, the Ninth Circuit seriously undermined this Court's decisions governing the right of access to public records. Moreover, the stringent review applied by the Ninth Circuit erroneously led it to conclude that Section 6254(f)(3), by providing address information to the press, scholars, and investigators, fails to advance the state's interest in protecting individual privacy.

1. Restrictions on the release of government records do not violate the First Amendment. "This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control." *Houchins v. KQED*, 438 U.S. 1, 8 (1978) (plurality opinion). To the contrary, when the government decides to release information, "the processes thereunder are a matter of legislative grace." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984). In fact, the Court has encouraged state governments to "establish and enforce procedures" governing the release of "sensitive information [in their] custody," as "a less drastic means than punishing truthful publication [to] guard[] against the dissemination of private facts." *Florida Star v. BJF*, 491 U.S. 524, 534 (1989).

The Ninth Circuit ignored these precedents and instead recast Section 6254(f)(3) as a restriction on Respondent's right to disseminate address information, notwithstanding that the statute does not restrict commercial speech in any sense previously recognized by this Court. "[T]he test for identifying commercial speech" is whether the subject of government regulation "propose[s] a commercial transaction." *Board of Trustees v. Fox*, 492 U.S. 469, 473 (1989) (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976)). Respondent proposes a commercial transaction when it advertises to attorneys, insurance companies, and others that it has address information for sale. As the Ninth Circuit itself recognized, Respondent's "speech can be reduced to, 'I [United Reporting] will sell you [client] the X [names and addresses of arrestees] at the Y price.'" Pet. App. 29a (alterations in original). Section 6254(f)(3) does not

interfere with such an advertisement. To the contrary, Respondent "may disseminate the identical information . . . as long as the information is gained through means independent of" state arrest records. *Seattle Times Co.*, 467 U.S. at 33.

Nor does Section 6254(f)(3) constitute an impermissible *indirect* burden on Respondent's speech. Respondent contends that it cannot advertise that it has address information available for sale for the simple reason that Section 6254(f)(3) forbids Respondent from acquiring that information. But such a restriction does not violate the First Amendment; as with all government determinations regarding the release of records, it is a matter of legislative grace. Thus, in *Zemel v. Rusk*, the Court rejected the argument that the federal ban on travel to Cuba interfered with the First Amendment right to gather information about the effects of U.S. policy:

[There] are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.

381 U.S. 1, 16-17 (1965).

2. The remaining contention of the court of appeals – that Section 6254(f)(3) is invalid because it is irrational – is erroneous as well. According to the Ninth Circuit, "[i]t is not rational for a statute which purports to advance the governmental interest in protecting the privacy of arrestees to allow the names and addresses of the same to be published in any newspaper, article, or magazine in the country so long as the information is not used for commercial purposes." Pet. App. 35a. But although the press may frequently report the names of persons who have been arrested, experience suggests that such reports rarely include the arrested person's *address*,

which is the one piece of information withheld from Respondent by Section 6254(f)(3). For this reason, California (like the other states with similar statutes) reasonably could conclude that commercial access to address information would result in direct solicitations of arrestees or the creation of unreliable data banks of criminal history data, and that these commercial uses of address information would constitute an invasion of privacy of a different order of magnitude than any reporting by the press. *Accord Lanphere*, 15 F.3d at 1514 (“[P]laintiffs would not be involved in this litigation if the information they seek is so widely available that the privacy of the accused is no longer at issue.”).

The Ninth Circuit’s contrary conclusion – that the government must make such records available to everyone or to no one at all – is not supported by this Court’s precedents. For example, in *Nixon v. Warner Communications*, 435 U.S. 589, 594, 609 (1978), the Court refused to require the release of the Nixon tapes to businesses seeking to “sell to the public the portions of the tape played at the trial [of various White House officials]” despite the fact that “the contents of the tapes were given wide publicity by all elements of the media.” *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), is not to the contrary. In that case, the government irrationally attempted to distinguish *within* classes of commercial speech in several respects: by permitting the publication of alcohol-strength data in advertisements but not on beer labels; by nonetheless permitting the use of the phrase “malt liquor” on beer labels as an indicator of strength; and by requiring that strength information appear on labels of many distilled spirits. *Id.* at 488-89. Section 6254(f)(3) does not suffer from any such irrationality: the statute incrementally increases individual privacy by minimizing the instances in which address information is unnecessarily disclosed.

The Ninth Circuit’s analysis also ignores the state’s efforts to strike a balance between maintaining individual privacy and furthering core First Amendment values. California unquestionably could adopt a complete prohibition on access to arrestee address records, which would more completely protect

the privacy of arrestees. *Id.* 14a. (Ironically, that may ultimately be the state’s response if the decision below is allowed to stand.) But such a prohibition would deprive the press of address information, which although it would be constitutional would be inimical to the fundamental goals of the First Amendment. Section 6254(f)(3) constitutes a reasoned effort to avoid interfering with the press while at the same time preserving individual privacy where possible.

### CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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## APPENDIX OF RELATED STATUTES

### A. POLICE REPORT STATUTES

1. Ariz. Rev. Stat. § 28-667 (1998).
2. Cal. Gov't Code § 6254 (Deering 1997) (invalidated by United Reporting Publishing Corp. v. California Hgwy. Patrol, 146 F.3d 1133 (9th Cir.1998), aff'g 946 F. Supp. 822 (S.D. Cal. 1996)).
3. Colo. Rev. Stat. § 24-72-305.5 (1997) (sustained by Lanphere & Urbaniak v. Colorado, 21 F.3d 1508 (10th Cir.), cert. denied, 513 U.S. 1044 (1994)).
4. Fla. Stat. chs. 119.105, 316.066, 316.650, 327.301 (1998) (ch 316.650(11) invalidated by Babkes v. Satz, 944 F. Supp. 909 (S.D. Fla. 1996)).
5. Ga. Code Ann. §§ 33-24-53, 35-1-9 (1998) (§ 33-24-53(c) invalidated by Statewide Detective Agency v. Miller, No. 96-Civ-1033 (WBH), Order (N.D. Ga. Aug. 12, 1998); § 35-1-9 invalidated by Speer v. Miller, 15 F.3d 1007 (11th Cir. 1994), on remand, 864 F. Supp. 1294 (N.D. Ga. 1994)).
6. Haw. Rev. Stat. Ann. § 286-172 (Michie 1997).
7. Ky. Rev. Stat. Ann. § 189.635 (Michie 1996) (invalidated by Amelkin v. Commissioner, Dep't of St. Police, 936 F. Supp. 428 (W.D. Ky. 1996), on remand from Amelkin v. McClure, No. 94-6161, 1996 U.S. App. LEXIS 1414 (6th Cir. Jan. 9, 1996)).
8. La. Rev. Stat. Ann. § 32:398 (West 1998) (sustained by DeSalvo v. Louisiana, 624 So. 2d 897 (La. 1993), cert. denied, 510 U.S. 1117 (1994)).



9. Md. Code Ann., State Gov't § 10-616 (1997).
10. N.M. Stat. Ann. § 14-2A-1 (Michie 1998) (invalidated by Lavalle v. Udall, Civ. A. No. 94-0404-M, Order (D.N.M Feb. 16, 1996)).
11. Okla. Stat. tit. 51, § 24A.8 (1997); H.Bill 1665, 46th Leg., 2d. Sess. (Okla. 1997).
12. S.C. Code Ann. § 56-5-1275 (Law. Co-op. 1997) (sustained in Walker v. South Carolina Dep't of Highways & Pub. Trans., 466 S.E.2d 346 (S.C. 1995)).
13. Tex. Bus. & Com. Code Ann. § 35.54 (West 1998) (invalidated by Innovative Database Sys. v. Morales, 990 F.2d 217 (5th Cir. 1993)).

#### B. GENERAL PUBLIC RECORD STATUTES

1. Ariz. Rev. Stat. § 39-121.03 (1997).
2. Cal. Gov't Code §§ 6253, 6255 (Deering 1997).
3. Ky. Rev. Stat. Ann. § 61.870 (Michie 1996).
4. Md. Code Ann., State Gov't § 9-1015 (1997).
5. N.M. Stat. Ann. § 14-3-15.1 (Michie 1998).
6. N.Y. Pub. Off. Law § 89 (Consol. 1998).
7. R.I. Gen. Laws § 38-2-6 (1997).
8. S.C. Code Ann. §§ 30-4-50 (Law Co-op. 1997).
9. Wash. Admin. Code. § 292-10-040 (1997)
10. Wash. Rev. Code Ann. § 42.17.260 (Michie 1997).

#### C. MOTOR VEHICLE STATUTES

1. 18 U.S.C. 2721, 2722 (1998).
2. Ark. Code Ann. § 27-14-412 (Michie 1997).
3. Ariz. Rev. Stat. § 28-452 (1998).
4. 625 Ill. Comp. Stat. 5/2-123 (West 1998).

5. Mich. Stat. Ann §4.480(8) (Law. Co-op 1997).
6. 75 Pa. Cons. Stat. § 6114 (1997).
7. Utah Code Ann. § 41-1a-116 (1998).

#### D. PUBLIC ASSISTANCE STATUTES

1. 42 U.S.C.S. § 1306a (1998) (stating that state legislation governing public access to state disbursement records may include provisions restricting access for commercial purposes); See also, 45 C.F.R. § 205.50 (1998).
2. Ga. Code. Ann. § 49-4-14 (1997).
3. 305 Ill. Comp. Stat. 5/11-12 (West 1998).
4. Ind. Code. Ann. § 12-14-22-8 (Michie 1998).
5. La. Rev. Stat. Ann. § 46:56 (West 1998).
6. Mich. Stat. Ann. § 16.464 (Law. Co-op. 1997).
7. Neb. Rev. Stat. Ann. § 68-313.01 (Michie 1997).
8. N.Y. Soc. Serv. Law § 136 (Consol. 1998).
9. N.C. Gen. Stat. § 108A-80 (1997).
10. Vt. Stat. Ann. tit. 33 § 111 (1997).
11. H. Bill 3076, 55th Leg. (Wash. 1997).
12. Wis. Stat. § 49.32 (1997).

#### E. ELECTION STATUTES

1. 2 U.S.C. § 438 (1998) (regarding administrative provisions related to disclosure of federal campaign funds).
2. Ala. Code. § 17-22A-11 (1997).
3. Colo. Rev. Stat. §§ 1-45-111 to 112 (1997).
4. D.C. Code Ann. §§ 1-1433, 1456 (1998).
5. Haw. Rev. Stat. § 11-193 (1997).

6. Fla. Stat. ch. 98.095 (1997).
7. Idaho Code § 34-437 (1997).
8. Ind. Code. Ann. § 3-9-4-5 (Michie 1998).
9. Iowa Code § 68B.32A (1997).
10. Kan. Stat. Ann. §§ 25-2320a, 4154, 4186 (1997).
11. Md. Code Ann. art. 33, § 3-22 (1997).
12. Mich. Stat. Ann. §§ 4.1703(16), .1704(11) (1997).
13. Minn. Stat. §10A.02 (Supp. 1997).
14. Mo. Rev. Stat. §§ 115.158, 130.056 (1997).
15. Neb. Rev. Stat. Ann. § 32-330 (Michie 1997); Neb. Rev. Stat. Ann. § 49-14, 132 (Michie 1998).
16. Okla. Stat. tit. 74 § 4253 (1997).
17. Or. Rev. Stat. § 247.955 (1997).
18. S.D. Codified Laws § 12-25-34 (Michie 1998).
19. Wis. Stat. §§ 11.21- .22 (1997).
20. Wyo. Stat. Ann. § 22-2-113 (Michie 1997).

#### F. MISCELLANEOUS

1. 5 U.S.C. app. § 105 (1998) (stating the requirements for public access to federal employee financial disclosure records); see also 5 C.F.R. 2634.603 (1998); 32 C.F.R. § 84.21 (1998); 32 C.F.R. pt. 1293 app. D. (1998); 45 C.F.R. 706.24 (1998); 47 C.F.R. 0.460, 19.743 (1998).
2. Ariz. Rev. Stat. § 36-136 (1998).
3. Conn. Gen. Stat. § 1-20b (1997); Pub. Act 97-99, substitute H. Bill 6883, 1997 Reg. Sess. (Conn.).

4. Ind. Code. Ann. § 5-14-3-5 (Michie 1998).
5. Md. R. Ann. 511 (1997).
6. Mich. Stat. Ann. § 24.1012 (Law/ Co-op. 1997).
7. N.C. Gen. Stat. § 132-1.4 (1997).
8. Or. Rev. Stat. §§ 192.501, 314.865 (1997).
9. S.C. Code Ann. § 30-4-40 (Law. Co-op. 1997).
10. Va. Code Ann. § 55-370 (Michie 1998).
11. Wash. Rev. Code Ann. §§ 19.182.010, 82.32.330 (Michie 1997).

**Cal. Gov. Code § 6254**

Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

\* \* \* \*

- (f) Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes, except that state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (c) of Section 13960, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation. However, nothing in this division shall require the disclosure of that portion of

those investigative files that reflect the analysis or conclusions of the investigating officer.

Other provisions of this subdivision notwithstanding, state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:

- (1) The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.
- (2) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The name of a victim of any crime defined by Section 220, 261,



262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is the victim of more than one crime, information disclosing that the person is a victim of a crime defined by Section 220, 261, 262, 264, 264.1, 273a, 273d, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements of this paragraph.

- (3) Subject to the restrictions of Section 841.5 of the Penal Code and this subdivision, the current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator as described in Chapter 11.3 (commencing with Section 7512) of Division 3 of the Business and Professions Code, except that the address of the victim of any crime defined by Section 220, 261, 262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code shall remain confidential. Address information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury.

UNITED REPORTING PUBLISHING CORP., a California Corporation, Plaintiff, vs. DANIEL E. LUNGREN, Attorney General for the State of California; THE CALIFORNIA HIGHWAY PATROL; DWIGHT O. HELMICK, JR., Commissioner of the California Highway Patrol; POLICE DEPARTMENT FOR THE CITY OF ALHAMBRA; POLICE DEPARTMENT FOR THE CITY OF CHULA VISTA; POLICE DEPARTMENT FOR THE CITY OF DALY CITY; POLICE DEPARTMENT FOR THE CITY OF DOWNEY; POLICE DEPARTMENT FOR THE CITY OF DUBLIN; POLICE DEPARTMENT FOR THE CITY OF FREMONT; POLICE DEPARTMENT FOR THE CITY OF HAYWARD; POLICE DEPARTMENT FOR THE CITY OF LOS ANGELES, POLICE DEPARTMENT FOR THE CITY OF LOS GATOS, POLICE DEPARTMENT FOR THE CITY OF MOUNTAIN VIEW; POLICE DEPARTMENT FOR THE CITY OF OAKLAND; POLICE DEPARTMENT FOR THE CITY OF OCEANSIDE; POLICE DEPARTMENT FOR THE CITY OF PALO ALTO; POLICE DEPARTMENT FOR THE CITY OF PLEASANTON; SHERIFF'S DEPARTMENT FOR THE COUNTY OF RIVERSIDE; POLICE DEPARTMENT FOR THE CITY OF SAN FRANCISCO; POLICE DEPARTMENT FOR THE CITY OF SOUTH SAN FRANCISCO; SHERIFF'S DEPARTMENT FOR THE COUNTY OF SAN BERNARDINO; SHERIFF'S DEPARTMENT FOR THE COUNTY OF SAN DIEGO; SHERIFF'S DEPARTMENT FOR THE COUNTY OF SAN JOAQUIN; POLICE DEPARTMENT FOR THE CITY OF SAN PABLO; POLICE DEPARTMENT FOR THE CITY OF SANTA MONICA; SHERIFF'S DEPARTMENT FOR THE COUNTY OF SANTA CLARA; POLICE DEPARTMENT FOR THE CITY OF SUNNYVALE; Defendants.

Civ. No. 96-0888B (AJB)

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF CALIFORNIA

946 F. Supp. 822

November 27, 1996, FILED

COUNSEL: Guylyn R. Cummins, San Diego. Ben P. Jones, San Diego, For Plaintiff.

James K. Hahn, Los Angeles. Frederick N. Merkin, Los Angeles. Bryon R. Broeckman, Los Angeles. Linda A. Cabatic, Sacramento. Allen Sumner, Sacramento. Ian Fan, San Diego, For Defendant.

JUDGES: Rudi M. Brewster, UNITED STATES DISTRICT JUDGE

This case presents a facial challenge to a provision of the California Public Records Act, California Government Code § 6254, as that provision was amended, effective July 1, 1996, pursuant to Senate Bill 1059. The Court, having reviewed the moving and opposing papers and the oral arguments of counsel hereby GRANTS plaintiff's motion for summary judgment and DENIES defendants' motions for summary judgment.

### I. Background

Prior to July 1, 1996, the California Public Records Act provided that "state and local law enforcement agencies shall make public . . . the full name, current address, and

occupation of every individual arrested by the agency[.]" Cal. Gov. Code § 6254. This made arrestee addresses available to anyone for any purpose. Cal. Gov. Code § 6254(f) was amended, effective July 1, 1996, to prohibit the release of arrestee addresses only to people who intend to use those addresses for commercial purposes. Cal. Gov. Code § 6254(f)(3) provides that state and local law enforcement agencies shall make public:

the current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalties of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator. . . . Address information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury.

Plaintiff United Reporting Publishing Corp. ("United Reporting") is a private publishing service that has been providing, under the former version of this statute, the names and addresses of recently arrested individuals to its clients. These clients include attorneys, insurance companies, drug and alcohol counselors, religious counselors, driving schools, and others. The defendants remaining in this action are various state and local law enforcement agencies.

Plaintiff's complaint seeks declaratory judgment and injunctive relief pursuant to 42 U.S.C. § 1983 to hold the amendment to section 6254 unconstitutional under the First Amendment to the United States Constitution (first cause of action), and unconstitutional under the Fourteenth Amendment to the United States Constitution (second, third, and fourth causes of action).



Plaintiff United Reporting and defendants County of San Diego Sheriff's Department, California Highway Patrol, and Los Angeles Police Department have filed cross-motions for summary judgment.

## II. Issue

Is the amendment to Cal. Gov. Code § 6254 an unconstitutional limitation on plaintiff's commercial speech?

## III. Discussion

### A. Scope of First Amendment Protection

Courts have historically recognized a common law right, but not an absolute right, of access to certain government records, including judicial records. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978). In this case, this common law right has been supplanted by the California Public Records Act of 1968 which made public all arrest records of law enforcement agencies. The issue, therefore, is whether plaintiff is protected by an overriding federal constitutional right of access to this particular government information.

Courts have uniformly answered this question in the negative: there is no constitutional right, and specifically no First Amendment right, of access to all governmental records. *Houchins v. KQED, Inc.*, 438 U.S. 1, 9, 14 (1978) ("This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control. . . . [Accordingly], there is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information"); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1511 (10th Cir. 1994) (same); *Calder v. I.R.S.*, 890 F.2d 781, 783-84 (5th Cir. 1989) ("the right to speak and publish does not carry with it an unrestricted license to gather information"); *Speer v. Miller*, 864 F. Supp. 1294, 1297-98 (N.D. Ga. 1994). The First Amendment directly protects the expression of information already obtained; it does

not guarantee access to the sources of information. *Houchins*, 438 U.S. at 10 ("reference to a public entitlement to information mean[s] no more than that the government cannot restrain communication of whatever information the media acquire--and which [the government] elect[s] to reveal"). As explained by the Supreme Court:

There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy . . . . The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.

The Constitution, in other words, establishes the contest, not its resolution. Congress may provide a resolution, at least in some instances, through carefully drawn legislation. For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society.

*Id.* at 14-15, (quoting Hon. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975)).<sup>1</sup>

<sup>1</sup> Two exceptions have been crafted to the general rule that there is no First Amendment right of access to government information. First, the Supreme Court has found a constitutional right of public access to criminal trials and court proceedings. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-78 (1980) ("In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those guarantees."); *Gannett v. Depasquale*, 443 U.S. 368 (1979) (no right to attend suppression hearing); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (right to attend jury voir dire); *Associated Press v. United States Dist. Court*, 705 F.2d 1143 (9th Cir. 1983) (right of access to pretrial criminal proceedings and pretrial documents).

Second, courts have found a First Amendment right of access to judicial records. See *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985) (finding a common law right to inspect and copy judicial records); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989) (finding a First Amendment right of access to records of criminal cases); *Associated Press*, 705 F.2d at 1145 (finding a

The Court concludes that the First Amendment does not provide plaintiff with a blanket constitutional right of access to arrestee addresses; the state could constitutionally prevent everyone from having access to this information. This does not, however, foreclose plaintiff's claim. As previously outlined, the instant statute is an amendment to the California Public Records Act which makes all arrestee information public, but then limits access only to those who plan to use arrestee addresses in commercial speech. The amended statute states that "address information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals[.]" Cal. Gov. Code § 6254(f)(3). Functionally, this is a limitation on commercial speech. The government is the only source of this information and by statute is disseminating it to everyone except commercial users. The government cannot denominate this a limitation on access in order to achieve a limitation on non-preferred speech. This limitation on access constitutes an indirect limitation on commercial speech.

Recently, two circuits held similar statutes limiting the right of access to government arrest information indirectly implicate First Amendment concerns because such statutes indirectly "punish" certain (commercial), but not all, uses of the information.<sup>2</sup> *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir. 1994), and *Speer v. Miller*, 15 F.3d 1007 (11th

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right of access to pretrial documents); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) (right of access to plea hearings and sentencing hearings).

Neither of these exceptions to the general *Houchins* rule assists plaintiff. Both of these exceptions are premised on the long tradition of open trials dating back to England and the colonial United States. The Third Circuit, in *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164 (3rd Cir. 1986), created a two prong test for determining whether the public has a constitutional right of access to judicial proceedings or documents. First, there must be a tradition of access to these items, and second, public access must play a significant role in the functioning of the particular process in question. *Id.* at 1174. While there is a long tradition of access to documents placed in official court records, there has been no showing that there is a long tradition of public access to law enforcement blotter sheets and arrest records, or that the public has played a significant role in the arrest process.

<sup>2</sup> There appears to be no Ninth Circuit authority on this issue.

Cir. 1994), *on remand*, 864 F. Supp. 1294 (N.D. Ga. 1994),<sup>3</sup> both involved state statutes that denied commercial users access to criminal records.<sup>4</sup> In both cases, the courts acknowledged that there is no general First Amendment right of access to criminal justice records. *Lanphere*, 21 F.3d at 1512; *Speer*, 864 F. Supp. at 1297-98. Both courts, however, went on to conclude that the First Amendment was implicated by the respective state statutes. As explained by *Lanphere*, the First Amendment is implicated because a direct ban on access to information can serve as an indirect ban on the usage of such information in speech, and therefore can constitute impermissible content-based regulation of speech:

Although criminal justice records themselves do not constitute speech, the Colorado Legislature has drawn a regulatory line based on the speech use of such records. [The challenged statute] disallows the release of records to those wishing to use them for commercial speech, while allowing the release of the same records to those having a noncommercial purpose. Because commercial speech is protected under the First Amendment (though it is accorded lesser protection than 'core' First Amendment speech), and because such speech includes direct mail

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<sup>3</sup> The *Speer* decision of the District Court is after remand from the Eleventh Circuit which vacated a contrary first decision of the District Court. In vacating and remanding the District Court's first decision, the Eleventh Circuit stated "[a] mere reading of this statute indicates that it probably impinges upon *Speer's* commercial speech." *Speer v. Miller*, 15 F.3d 1007, 1010 (11th Cir. 1994).

<sup>4</sup> In *Lanphere*, the state statute in question required the government custodian to "deny any person access to records of official actions and criminal justice records unless such person signs a statement which affirms that such records shall not be used for the direct solicitation of business for pecuniary gain." 21 F.3d at 1510-11. In *Speer*, the statute in question declared it "unlawful for any person to inspect or copy any records of a law enforcement agency to which the public has a right of access . . . for the purpose of obtaining the names and addresses of the victims of crimes or persons charged with crimes . . . for any commercial solicitation of such individuals or relatives of such individuals." 15 F.3d at 1009



solicitation, what we have in the end is a content-based restriction on protected speech.

21 F.3d at 1513 (citations omitted); see *Speer*, 864 F. Supp. at 1299; see also *Minneapolis Star v. Minnesota Dept. of Revenue*, 460 U.S. 575 (1983) (use tax on paper and ink levied only on producers of periodic publications singled out the press for differential treatment and was an unconstitutional indirect limitation on speech).

The Court concludes that the amended Cal. Gov. Code § 6254(f) is a content-based indirect limitation on commercial speech which implicates the First Amendment.

#### B. Central Hudson Commercial Speech Test

Since First Amendment commercial speech interests are implicated by the amended Cal. Gov. Code § 6254, the statute must be subjected to the four part test set out in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980).

[1] At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. [3] If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

*Id.* at 566.

#### 1. Is Plaintiff's Commercial Speech Activity Lawful?

There is no contention that Plaintiff's proposed use of this information is misleading or is not a lawful activity.

#### 2. Are the Governmental Interests Substantial?

The defendants advance two substantial government interests which they claim support this statute. The legislative history quotes Senator Peace as follows:

From a law enforcement perspective, the processing of the requests puts a tremendous strain on already scarcely allocated time and resources. From a consumer perspective, this is an invasion of privacy. While these records are justifiably public in many ways, the unsolicited direct mail advertisements are unwarranted.

Legislative History (June 4, 1996 letter), p. 4. Both the *Speer* and *Lanphere* courts found that the governmental interest in protecting the privacy of arrestees was substantial. *Speer*, 864 F. Supp. at 1302; *Lanphere*, 21 F.3d at 1514-15; see also *Florida Bar v. Went for It, Inc.*, 132 L. Ed. 2d 541, 115 S. Ct. 2371, 2376-80 (1995) (upholding 30 day ban on direct mail attorney solicitations based on the government's substantial interest in protecting the privacy and tranquility of personal injury victims); *Carey v. Brown*, 447 U.S. 455, 471, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980) ("the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society"). With respect to the government's concern about the fiscal burden of producing arrestee information, the direct costs of duplicating would be paid by plaintiff, but the costs of aggregating and organizing all of the information and the labor involved in duplicating are presently borne by the law enforcement agencies. Given the strictures of governmental budgets, the government has an interest in minimizing these costs.

#### 3. Whether the Restriction Directly and Materially Advances the Governmental Interests

To establish that the restriction on commercial speech advances the above-identified government interests in a

direct and material way, the government body must demonstrate that the harms are real and that the restrictions will, in fact, alleviate those harms to a material degree. *Florida Bar*, 115 S. Ct. at 2377.

First, it is doubtful that this amended statute will save defendants any money at all. The costs of gathering and preparing arrestee information will still be incurred under this statute because law enforcement agencies will still have to compile the identical arrestee data for journalists, government employees and other non-commercial users of the information. The additional costs of making copies for commercial users would be marginal, especially when they can be charged all of the costs of duplication. Moreover, under this statute the law enforcement agencies still have to compile and copy all arrestee information for commercial users except for addresses. The simple omission of addresses will not minimize law enforcement agency expenses.<sup>5</sup>

Second, the amended statute also fails to advance the state's interest in protecting the privacy and tranquility of its residents. In its most recent pronouncement on commercial speech, the Supreme Court upheld a statute prohibiting lawyers from sending direct mail solicitations to accident victims within 30 days of the accident. *Florida Bar*, 115 S. Ct. at 2381. The asserted state interest behind the statute was to protect "the personal privacy and tranquility of [Florida's] citizens from crass commercial intrusion by attorneys upon their personal grief in times of trauma." *Id.* at 2379. The Supreme Court concluded that the statute directly and materially advanced this interest by requiring attorneys to wait 30 days before sending direct mail solicitations to victims. *Id.*

The Supreme Court's holding in *Florida Bar* does not control the outcome in this case for two reasons. First, the ban

<sup>5</sup> If this were the state's real concern, they could appropriately charge commercial users for the copies and use the additional revenue to cover the marginal cost increase, if any. Plaintiff has expressed its willingness to pay any additional costs incurred because of its information requests.

at issue in *Florida Bar* only lasted for 30 days after the accident, whereas the ban on publication of arrestee addresses in section 6254(f)(3) is permanent. Permanent bans on attorney direct mail solicitation have been invalidated. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 85 L. Ed. 2d 652, 105 S. Ct. 2265 (1985); *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 100 L. Ed. 2d 475, 108 S. Ct. 1916 (1988). Second, the purpose of the statute in *Florida Bar* was to protect vulnerable victims from offensive attorney solicitation practices. Presumably accident victims would be most vulnerable immediately after the accident and would seldom require immediate legal representation, but once they have had a month to recover, they should be able to evaluate attorney solicitations more effectively. Arrestees, in contrast, potentially could need immediate legal assistance to prevent them from making self-incriminating statements, to help them obtain bail, and to prepare for any subsequent criminal proceedings. This interest so heavily outweighs any concern that arrestees may find such attorney solicitations offensive that the defendants' justification borders on the disingenuous.

The two courts that dealt with statutes substantially similar to Cal. Gov. Code § 6254(f) split on whether the statutes materially advanced the state's interest in protecting the privacy of its citizens. In *Lanphere*, the Tenth Circuit held that the state's interest in protecting privacy is directly advanced when the State no longer allows access to names and addresses of those charged with misdemeanor traffic violations and DUI. Further, refusing access to such information reasonably directly advances the State's interest in lessening the danger of overreaching by solicitors where potential solicitation recipients may be particularly vulnerable. 21 F.3d at 1515.<sup>6</sup> The *Speer* court reached the opposite conclusion.

<sup>6</sup> In *Lanphere*, the state statute in question required the government custodian to "deny any person access to records of official actions and criminal justice records unless such person signs a statement which affirms that such records shall not be used for the direct solicitation of business for pecuniary gain." 21 F.3d at 1510-11.



This Court believes that the narrow and selective manner in which the Georgia statute attempts to further the asserted interest of protecting people's privacy betrays the state's true focus and its inability to serve the state's asserted interest. The State does not restrict all (or probably even most) possible invasions of a person's privacy. Anyone may access the records in question so long as they do not do so with an eye towards using the information for certain types of commercial solicitations. The media may peruse and report the records, academicians may employ them in their research, statisticians may gather their contents for inclusion in their computations, inventive entrepreneurs may use their contents for the commercial solicitation of individuals neither named nor related to persons named therein, curiosity seekers may browse through them in search of titillation, or personal enemies may even extract information from them for diabolical (yet otherwise lawful) purposes. Only entities intending to use the names and addresses of those mentioned therein to solicit those people or their relatives for commercial purposes are denied access. The restriction's exceedingly narrow scope betrays it as a statute designed not to protect privacy but, instead, to prevent solicitation practices. And as *Shapero* teaches, a person's privacy is not infringed by the solicitation, but by the solicitor's discovery of the information that leads to the solicitation.

Accordingly, the Court finds that the Georgia statute does not directly advance the state's asserted interest because it advances that interest hardly at all and because it attempts to protect those named in the records primarily by preventing solicitations rather than by preventing significant access.

The Court agrees with the reasoning of the *Speer* court. It is hard to see how direct mail solicitations invade the privacy of arrestees. If they don't like the solicitation, they can simply throw it away. See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983) (the short though regular journey from mail box to trash can is an acceptable burden, at least as far as the Constitution is concerned). At worst, it could be somewhat embarrassing for them to receive a letter from an attorney offering services to them now that they are a 'suspected criminal.' It may also be embarrassing for arrestees to have their addresses published in newsletters, but it would only be marginally more embarrassing, if at all, than just having their name published. Further, the statute still allows their name and address to be published in newspapers, broadcast on television, and/or obtained by an employer or even an enemy. These are potentially much more pervasive invasions of privacy, yet the statute allows them. Moreover, United Reporting attaches affidavits from many arrestees stating that they do not feel that the solicitations invaded their privacy and that they found them helpful in obtaining legal representation or other services. Defendants filed no contrary affidavits. The *Speer* court appears correct that one of the real reasons behind the statute is to prevent the solicitations themselves because vulnerable people are lured into bad deals with lawyers. The statute may also have been intended to prevent arrestees from obtaining counsel because law enforcement agencies find it easier to deal with arrestees who are not represented by counsel.<sup>7</sup> The Court concludes that the statute, rather than protecting the privacy of its citizens, actually hinders the ability of arrestees to obtain needed counsel and advice to deal with their legal problems.

Since Cal. Gov. Code § 6254(f)(3) does not directly and materially advance the state's asserted interests in

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<sup>7</sup> The Court notes that it was state and local law enforcement agencies and district attorneys' offices which proposed this amendment to § 6254.



minimizing costs and protecting the privacy of arrestees, it fails the third prong of the *Central Hudson* test.

#### 4. Whether the Regulation is Narrowly Drawn

The final prong of the analysis is whether the statute is narrowly drawn. This test requires a 'reasonable fit' between the legislature's ends and the means chosen to accomplish those ends. *Florida Bar*, 115 S. Ct. at 2380. There is not a reasonable fit between the cost rationale and prohibiting access to commercial users of the information. The law enforcement agencies must still compile and reproduce the information for non-commercial users. They must still provide all information except for the addresses to commercial users. Moreover, commercial users can be charged fees for any additional costs incurred. The amendment is not narrowly drawn because it does not decrease expenses of law enforcement agencies.

Whether there is a reasonable fit between the privacy rationale and prohibiting access to commercial users of the information collapses into the same analysis as whether the statute directly and materially advances the state interest. Since the prohibition on commercial use of the information does not materially advance the state's interest in protecting the privacy of its citizens, there is not a reasonable fit between the legislature's means and ends.

Since Cal. Gov. Code § 6254(f)(3) is more extensive than necessary to accomplish its asserted purpose, it also fails the fourth prong of the *Central Hudson* test.

The Court therefore finds Cal. Gov. Code § 6254(f)(3) to be an unconstitutional limitation on commercial speech.

#### C. Plaintiff's other causes of action

Since the Court finds Cal. Gov. Code § 6254(f)(3) unconstitutional as an impermissible limitation on commercial speech, the Court does not reach plaintiff's other causes of action.

#### IV. Conclusion

For the foregoing reasons, the Court finds that Cal. Gov. Code § 6254(f)(3) is an impermissible restriction on commercial speech which violates the First Amendment. For this reason, the Court hereby GRANTS plaintiff's motion for summary judgment and DENIES defendants' motions for summary judgment.

Plaintiff shall lodge a proposed judgment of declaratory and injunctive relief within twenty days with counsel and the Court. Defendants shall have ten days to object to the form of the judgment, whereupon it shall stand submitted for Court revision and signature.

IT IS SO ORDERED.

Dated: NOV 27 1996

Rudi M. Brewster

UNITED STATES DISTRICT JUDGE

UNITED REPORTING PUBLISHING CORP., a  
California corporation, Plaintiff-Appellee, v. CALIFORNIA  
HIGHWAY PATROL, Defendant, and LOS ANGELES  
POLICE DEPARTMENT, Defendant-Appellant.

No. 97-55111

UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT

146 F.3d 1133

June 25, 1998, Filed

COUNSEL: Byron R. Boeckman, James K. Hahn,  
Fredrick N. Merkin, City Attorneys, Los Angeles, California,  
for defendant-appellant Los Angeles Police Department.

Guylyn R. Cummins, Ben P. Jones, Gray, Cary, Ware &  
Freidenrich, San Diego, California, for plaintiff-appellee  
United Reporting.

JUDGES: Before: Jerome Farris, Diarmuid F.  
O'Scannlain, and Ferdinand F. Fernandez, Circuit Judges.  
Opinion by Judge O'Scannlain.

O'SCANNLAIN, Circuit Judge:

We must decide whether a state regulation that  
prohibits the release of arrest information for commercial  
purposes violates the First Amendment.

Prior to July 1, 1996, California Government Code §  
6254 provided that "state and local law enforcement agencies  
shall make public . . . the full name, current address, and  
occupation of every individual arrested by the agency." Cal.  
Gov. Code § 6254(f). This provision made arrestee addresses  
available to anyone for any purpose. On July 1, 1996,  
however, California Government Code § 6254(f) was  
amended to prohibit the release of arrestee addresses to people  
who intend to use those addresses for commercial purposes.  
California Government Code § 6254(f) now provides that state  
and local law enforcement agencies shall make public:

the current address of every individual arrested by  
the agency and the current address of the victim of a  
crime, where the register declares under penalties of  
perjury that the request is made for a scholarly,  
journalistic, political, or governmental purpose, or that  
the request is made for investigation purposes by a  
licensed private investigator . . . . Address information  
obtained pursuant to this paragraph shall not be used  
directly or indirectly to sell a product or service to any  
individual or group of individuals, and the requester  
shall execute a declaration to that effect under penalty  
of perjury.

Cal. Gov. Code § 6254(f)(3) (emphasis added).

United Reporting Publishing Corporation ("United  
Reporting") is a private publishing service that had been  
providing, under the old version of the statute, the names and  
addresses of recently arrested individuals to its clients. These  
clients include attorneys, insurance companies, drug and  
alcohol counselors, religious counselors, and driving schools.  
The Los Angeles Police Department ("LAPD") maintains  
certain records relating to arrestees, including names,  
addresses, and the charges of arrest.

Pursuant to 42 U.S.C. § 1983, United Reporting filed  
a complaint before the district court seeking declaratory  
judgment and injunctive relief on the grounds that the  
amendment to § 6254 was unconstitutional under the First

Amendment and the Fourteenth Amendment to the United States Constitution. The district court agreed, holding that California Government Code § 6254(f)(3) violated the First Amendment. See *United Reporting Publishing Corp. v. Lungren*, 946 F. Supp. 822, 829 (S.D. Cal. 1996). The district court did not reach United Reporting's Fourteenth Amendment argument. The LAPD timely appealed.<sup>1</sup>

## II

The LAPD contends that the district court erred in holding that § 6254(f)(3) violates the First Amendment right to freedom of expression. Specifically, the LAPD maintains that the district court misapplied the four-part test laid down by the Supreme Court in *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980), for analyzing the constitutionality of government regulations limiting so-called "commercial" speech.

For its part, United Reporting argues that, contrary to the district court's finding, the activity in which it engages, selling arrestee information to clients, is not commercial speech at all, but noncommercial speech, the regulation of which is subject to strict scrutiny under the United States and California constitutions. In the alternative, United Reporting claims that § 6254(f)(3) burdens its dissemination of truthful, nonmisleading commercial speech concerning the right to retain competent counsel and other assistance in violation of the United States and California constitutions.

## III

We start with a comment on the protection provided under the First Amendment to what has been commonly

<sup>1</sup> Before the district court, the LAPD was joined by the San Diego Sheriff's Department and the California Highway Patrol. The LAPD is the only party to appeal the district court's decision.

designated "commercial" speech. Although the Supreme Court once held that the First Amendment did not protect commercial speech, see *Valentine v. Chrestensen*, (1942), it repudiated that position in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). The current debate centers not on whether commercial speech is a form of expression entitled to constitutional protection, but on the validity of the distinction between commercial and noncommercial speech. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (Thomas, J., concurring) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech. Indeed, some historical materials suggest to the contrary."); Kozinski & Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 634-38 (1990) (questioning basis for distinction). We are compelled, however, under the Supreme Court's current jurisprudence, to afford commercial speech less protection from governmental regulation than some other forms of expression. See, e.g., *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993) ("Our decisions . . . have recognized the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. The Constitution therefore affords a lesser protection to commercial speech than to other constitutionally guaranteed expression.") (citations omitted). Consequently, restrictions that might be violative of the First Amendment in other areas of expression may be tolerated in the realm of commercial speech. See *Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1330 (9th Cir. 1997).

As an initial matter, we must address United Reporting's claim that it uses arrestee information to engage in fully-protected noncommercial speech, the regulation of which is subject to strict scrutiny under the United States and California constitutions, not commercial speech, and that the district court erred in holding otherwise. United Reporting maintains that commercial speech has been "defined and limited" by the Supreme Court to "speech which does 'no more



than propose a commercial transaction." *Virginia State Bd.*, 425 U.S. at 762 (citations omitted). According to United Reporting, speech which goes beyond the mere proposal of such a transaction and involves the passing of ideas and information - including ideas and information necessary to the exercise of the Sixth Amendment right to retain the assistance of counsel - cannot be considered mere commercial speech.

The definition of commercial speech is not as settled as United Reporting would have us believe, however. Although "there is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment . . . more subject to doubt . . . are the precise bounds of the category of expression that may be termed commercial speech . . . ." *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637 (1985). United Reporting is correct that speech which "merely proposes a commercial transaction" falls within the boundaries of commercial speech; indeed, this is the "core notion" of commercial speech. *Bolger v. Youngs Drug Products*, 463 U.S. 60, 66, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983). This "core notion" is the beginning of our inquiry, however, not the end, as United Reporting claims. In *Central Hudson*, the Supreme Court indicated that it would regard as commercial speech any "expression related solely to the economic interests of the speaker and its audience." 447 U.S. at 561. This is obviously broader than speech which proposes a commercial transaction; people often discuss their economic interests without proposing commercial transactions. The Supreme Court has abstained from creating bright-line rules in this area and so should we. *See Bolger*, 463 U.S. at 66-68 (noting that advertisements are not necessarily commercial speech despite fact that advertiser has an economic motivation and that linking advertisements to important public issues does not necessarily entitle speech to constitutional protection afforded noncommercial speech). Hence, we must examine the disputed communication in light of its surrounding circumstances to determine whether it is entitled to the qualified protection accorded to commercial speech.

That said, United Reporting's speech would be considered commercial under either a broad or a narrow definition. United Reporting makes an effort to link its speech to that of its clients' solicitations to arrestees in an effort to demonstrate that it does more than propose an economic transaction. This effort fails. United Reporting sells arrestee information to clients; nothing more. Its speech can be reduced to, "I [United Reporting] will sell you [client] the X [names and addresses of arrestees] at the Y price." *See Virginia State Bd.*, 425 U.S. at 762. This is a pure economic transaction, *see Ficker v. Curran, Jr.*, 119 F.3d 1150, 1153 (4th Cir. 1997), comfortably within the "core notion" of commercial speech. *Bolger*, 463 U.S. at 66. Although this does not disqualify United Reporting from First Amendment protection, *see Virginia State Bd.*, 425 U.S. at 762, it does mean that its speech is entitled to only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 56 L. Ed. 2d 444, 98 S. Ct. 1912 (1978).<sup>2</sup>

#### IV

In *Central Hudson*, the Supreme Court articulated a four-part test under which to analyze the constitutionality of government regulations limiting commercial speech:

At the outset, (1) we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, (2) we ask whether the asserted governmental interest is substantial. If both inquiries yield positive

<sup>2</sup> It is not at all clear that the clients are engaging in noncommercial speech in any event. Every other court which has considered a statute similar to § 6254(f)(3) has found that attorney solicitation of arrestees under these circumstances constitutes commercial speech. *See, e.g., Moore v. Morales*, 63 F.3d 358, 361 (5th Cir. 1995); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1513 (10th Cir. 1994); *Speer v. Miller*, 15 F.3d 1007, 1010 (11th Cir. 1994).

answers, (3) we must determine whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566 (enumeration added).

The parties agree that the speech at issue is neither illegal nor misleading under the first prong. Rather, their dispute centers around the remaining three prongs of *Central Hudson*.

A Before the district court, the LAPD and its codefendants advanced two governmental interests in support of § 6254(f)(3):

From a law enforcement perspective, (1) the processing of the requests puts a tremendous strain on already scarcely allocated time and resources. From a consumer perspective, (2) this is a invasion of privacy. While these records are justifiably public in many ways, the unsolicited direct mail advertisements are unwarranted.

*United Reporting*, 946 F. Supp. at 826 (enumeration and emphasis added) (quoting Legislative History of § 6254(f)(3)). Only the second interest, protecting the privacy of arrestees, need concern us here.<sup>3</sup>

The LAPD has failed to challenge this finding on appeal. Consequently, it has waived any challenge to the district court's finding on the cost issue. See *Officers for Justice v. Civil Service Commission*, 979 F.2d 721, 726 (9th Cir. 1992)

<sup>3</sup> Although the district court found the asserted governmental interest in minimizing the costs of producing arrestee information to be substantial, see *United Reporting*, 946 F. Supp. at 826, it held that § 6254(f)(3) does not directly and materially advance this interest and, therefore, failed the third *Central Hudson* prong. See *id.* at 829.

(holding that failure to raise argument in opening brief constitutes waiver). Hence, the only interest at issue here is the asserted governmental interest in protecting the privacy of arrestees.

The district court found the interest in protecting the privacy of arrestees to be substantial. See *United Reporting*, 946 F. Supp. at 826. The district court was persuaded by the fact that numerous other courts considering similar statutes have reached the same conclusion. *Id.* (citing *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625-33 (1995); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1513-14 (10th Cir. 1994); *Speer v. Miller*, 864 F. Supp. 1294, 1297-98 (N.D. Ga. 1994)). Its finding is well-grounded: "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980). Indeed, "[the Supreme Court's] precedents . . . leave no room for doubt that 'the protection of potential clients' privacy is a substantial state interest.'" *Florida Bar*, 515 U.S. at 625. The Court has "noted that 'a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.'" *Id.* (quoting *Frisby v. Schultz*, 487 U.S. 474, 484-85, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988)). Hence, we hold that the district court was correct in finding the privacy interest of arrestees to be substantial.

B Determining the asserted interest in privacy to be substantial does not end our inquiry, however. Rather, we now turn to *Central Hudson*'s third prong, whether the challenged regulation "advances the Government's interest 'in a direct and material way.'" *Rubin v. Coors Brewing*, 514 U.S. 476, 487 (1995) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)). The LAPD, the "party seeking to uphold [the] restriction on commercial speech[,] carries the burden of justifying it." *Bolger*, 463 U.S. at 71 n.20. This burden may not be satisfied by "mere speculation or conjecture." *Edenfield*, 507 U.S. at



770. Instead, "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Coors Brewing*, 514 U.S. at 487 (quoting *Edenfield*, 507 U.S. 761 at 770). "The regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Edenfield*, 507 U.S. at 770 (quoting *Central Hudson*, 447 U.S. at 564).

The district court found that the amended statute does not directly and materially advance the government's interest in protecting the privacy and tranquility of its residents. See *United Reporting*, 946 F. Supp. at 827-29. The LAPD claims that the district court erred in so finding, arguing that a prohibition against the release of arrestee information "reduces the opportunity for commercial interests to create and maintain an unreliable criminal history information bank which could have the effect of destroying the employment potential of the innocent, the reformed, the pardoned and the young" and prevents the "direct intrusion into the private lives and homes of arrestees and victims."

First, the LAPD has provided no evidence whatsoever in support of its contention that there is a danger that commercial interests would create "unreliable criminal history information banks" if they had access to arrestee addresses. In fact, these addresses were available to commercial interests prior to the amendment of § 6254 and, as far as we can tell, no commercial interests have ever maintained the aforementioned "criminal history information banks." This asserted harm appears to be no more than speculation and conjecture, which is insufficient to sustain a restriction on commercial speech. See *Coors Brewing*, 514 U.S. at 487. Because the LAPD has failed to sustain its burden of proving that this harm is real, we need not consider whether the restriction will alleviate the asserted harm to a material degree. See *id.*

The second harm asserted by the LAPD, preventing the "direct intrusion into the private lives and homes of

arrestees and victims," is somewhat more weighty. The district court rejected the contention that § 6254(f)(3) directly and materially advances the governmental interest in protecting the privacy and tranquility of its residents. See *United Reporting*, 946 F. Supp. at 827. The district court found that § 6254(f)(3) does not restrict all (or probably even most) possible invasions of a person's privacy. See *id.* at 828. It noted that "anyone may access the records in question so long as they do not do so with an eye towards using the information for certain types of commercial solicitations." *Id.* (quoting *Speer*, 864 F. Supp. at 1302). The fact that journalists, academicians, curiosity seekers, and other noncommercial users may peruse and report on arrestee records, the district court observed, belies the LAPD's claim that the statute is actually intended to protect the privacy interests of arrestees. See *id.* Instead, it appears to be more directed at preventing solicitation practices. See *id.* The district court also noted that "it is hard to see how direct mail solicitations invade the privacy of arrestees. If they don't like the solicitation, they can simply throw it away." *Id.*; see also *Bolger*, 463 U.S. at 72 ("The First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech. Recipients of objectionable mailings, however, may effectively avoid further bombardment of their sensibilities simply by averting their eyes. Consequently, the short, though regular journey from the mail box to the trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.") (citations omitted). The district court correctly remarked that the privacy of arrestees was not invaded by the solicitation itself, but by the solicitor's discovery of the information that led to the solicitation. See *United Reporting*, 946 F. Supp. at 828 (citing *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988) ("The [privacy] invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery [through a targeted direct-mail solicitation].")).<sup>4</sup> For these reasons, the district

<sup>4</sup> The LAPD claims that the district court erred in not following the



court held that § 6254(f)(3) failed the third prong of *Central Hudson*. See 946 F. Supp. 829.

We agree with the district court. The myriad of exceptions to § 6254(f)(3) precludes the statute from directly and materially advancing the government's purported privacy interest. See *Valley Broadcasting Co.*, 107 F.3d at 1334. We take our direction from *Coors Brewing*, 514 U.S. 476, 131 L. Ed. 2d 532, 115 S. Ct. 1585, in which the Supreme Court held that 27 U.S.C. § 205(e)(2), which prohibited brewers from disclosing the alcohol content of beers on their labels, violated the First Amendment. See *id.* at 487-89. The Court held that the government's asserted interest in avoiding alcohol "strength wars" was substantial, but that § 205(e)(2) did not directly advance that interest "because of the overall irrationality of the Government's regulatory scheme." *Id.* at 488. In reaching its decision, the Court emphasized the numerous exceptions to § 205(e)(2), including the exception for wines and distilled spirits, which were allowed to list alcohol content on their

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Tenth Circuit's decision in *Lanphere & Urbaniak*, 21 F.3d 1508, which concerned a similar statute. In that case, the Tenth Circuit held that it had "no trouble" finding that the state's interest in protecting privacy was directly advanced by the statute in question. Unfortunately, our sister circuit failed to provide any analysis in support of its conclusion. See *id.* at 1515. Instead, the court simply asserted:

The State's interest in protecting privacy is directly advanced when the State no longer allows access to the names and addresses of those charged with misdemeanor traffic violations and [Driving Under the Influence]. Further, refusing access to such information reasonably directly advances the State's interest in lessening the danger of overreaching by solicitors where potential solicitation recipients may be particularly vulnerable.

*Id.* (emphasis added). The district court was correct not to follow *Lanphere*. *Lanphere* fails to take into account the Supreme Court's decision in *Edenfield*, 507 U.S. at 767 (holding that the second prong of *Central Hudson* requires the challenged regulation to advance the state interests "in a direct and material way," not merely a direct or "reasonably" direct way), and is in conflict with *Coors Brewing*, 514 U.S. 476, 131 L. Ed. 2d 532, 115 S. Ct. 1585, and our decision in *Valley Broadcasting*, 107 F.3d 1328, which we will discuss *infra*.

labels, and the failure to extend the ban on disclosing alcohol content to advertisements. See *id.* The Court held that "there is little chance that [the regulation at issue] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects." *Id.* at 489.

In *Valley Broadcasting*, we considered whether federal regulations which criminalized the broadcast of advertisements for casino gambling violated the First Amendment. See *Valley Broadcasting*, 107 F.3d at 1336. Applying *Coors Brewing*, we held that the federal ban on broadcast advertisements did not directly and materially advance the government's interests in reducing public participation in commercial lotteries and in protecting those states which chose not to permit casino gambling within their borders. See *Valley Broadcasting*, 107 F.3d at 1334-36. We were compelled to reach this result in light of the numerous exceptions to the ban, including those for state-run lotteries, fishing contests, not-for-profit lotteries, and gaming conducted by Indian tribes. See *id.* As did the Court in *Coors Brewing*, we held that the regulatory scheme could not directly and materially advance its aim while other provisions of the same statute directly undermined and counteracted its effects. See *Valley Broadcasting*, 107 F.3d at 1334.

Likewise here, we are compelled to hold that the numerous exceptions to § 6254(f)(3) for journalistic, scholarly, political, governmental, and investigative purposes render the statute unconstitutional under the First Amendment. It is not rational for a statute which purports to advance the governmental interest in protecting the privacy of arrestees to allow the names and addresses of the same to be published in any newspaper, article, or magazine in the country so long as the information is not used for commercial purposes. Having one's name, crime, and address printed in the local paper is a far greater affront to privacy than receiving a letter from an attorney, substance abuse counselor, or driving school eager to help one overcome his present difficulties (for a fee, naturally). The exceptions to § 6254(f)(3) "undermine and counteract" the asserted governmental interest in preserving privacy just as

surely as did the exceptions in *Coors Brewing* and *Valley Broadcasting*. We must therefore conclude that § 6254(f)(3) fails to satisfy *Central Hudson*.<sup>5</sup>

## V

Having concluded that § 6254(f)(3) violates *Central Hudson*, the district court properly struck it down as an unconstitutional infringement of United Reporting's First Amendment rights.<sup>6</sup>

AFFIRMED.

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<sup>5</sup> Because we conclude that the challenged regulation does not directly advance the asserted governmental interests, we need not reach the final prong of *Central Hudson*. See *Valley Broadcasting*, 107 F.3d at 1336 n.9.

<sup>6</sup> Because we hold that the challenged regulation violates the First Amendment, we do not reach United Reporting's equal protection, due process, or overbreadth arguments.

No. 98-678

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1998

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LOS ANGELES POLICE DEPARTMENT,

*Petitioner,*

vs.

UNITED REPORTING PUBLISHING CORPORATION,

*Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**RESPONDENT'S BRIEF IN OPPOSITION**

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## COUNTERSTATEMENT OF QUESTION PRESENTED

A unanimous panel of the Ninth Circuit correctly declared unconstitutional Cal. Gov't Code 6254(f)(3), which permits police agencies to allow only selected groups access to public arrest records for government-approved public uses. The Ninth Circuit invalidated Section 6254(f)(3) on the narrow ground that it violates the First Amendment to allow the government to deny access to those who desire to use the information for commercial speech it disfavors. Critically, the district court also recognized that Section 6254(f)(3) allows police departments to censor important commercial speech affecting an arrestee's Sixth Amendment right to obtain competent legal counsel. As the Ninth Circuit found, the public use exceptions to Section 6254(f), including allowing widespread publication, betray its true purpose — to prevent government disapproved solicitation.

The question thus presented is whether the government can selectively allow certain groups of individuals to access public records for government approved purposes, and deny access to others based upon government disapproval of their speech.

## STATEMENT PURSUANT TO RULE 29.6

United Reporting Publishing Corporation has no parent or nonwholly owned subsidiary companies (Supreme Court, Rule 29.6).

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United Reporting Publishing Corporation ("United Reporting") respectfully files this brief in opposition to the Los Angeles Police Department's ("LAPD") Petition for a Writ of Certiorari to review the unanimous judgment of the United States Court of Appeals for the Ninth Circuit.

### **CONSTITUTIONAL AND STATUTORY PROVISIONS**

Article I, section 2(a) of the California Constitution provides in pertinent part:

Every citizen may freely speak, write and publish his sentiments, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

Cal. Gov't Code 6254(f) provides in pertinent part:

[S]tate and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation.

- (1) The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is

currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.

- (2) Subject to [confidentiality] restrictions imposed by . . . the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The name of a victim [of a sex offense crime] defined by . . . the Penal Code may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is a victim of more than one crime, information disclosing that the person is a victim of [a sex offense crime] defined by . . . the Penal Code may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements of this paragraph.

- (3) Subject to [confidentiality] restrictions of . . . the Penal Code and this subdivision, the current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator . . . , except that the address of the victim of [a sex offense crime] defined by . . . the Penal Code shall remain confidential. Address information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury.

#### STATEMENT OF THE CASE

##### A. Law Enforcement Agencies Lobbied For The Amendment of Section 6254(f) To Allow Selective Disclosure of Arrestee Addresses.

Before July 1, 1996, the California Public Records Act ("Act") mandated that "state and local law enforcement agencies *shall* make public . . . [t]he full name, current address, and occupation of every individual arrested by the agency[.]" Cal. Gov't. Code 6254 (emphasis added). The Act's underlying purpose is to provide maximum public access to information concerning the conduct of the people's business. Cal. Gov't. Code 6250 *et seq.* The preamble declares "that access is a *fundamental and necessary right of every person* in this state." Cal. Gov't. Code § 6250 (emphasis added).



The legislative history supporting Section 6254(f)'s mandatory arrest record disclosure provision reveals the primary impetus behind its passage:

[I]n recent years an aggressive attitude in reporting crime news has, in some instances, resulted in the closing of all records of police activity in apparent retaliation for critical press accounts in some cities.

*County of Los Angeles v. Superior Court*, 18 Cal. App. 4th 588, 596-98 (1993). The California Supreme Court agrees with California's Legislature that there is an overriding public interest in notifying the public of arrestees charged with crimes, that trumps arrestee privacy rights. *Loder v. Municipal Court*, 17 Cal. 3d 859, 863 (1976).

In September 1995, however, at the urging of state and local law enforcement agencies and district attorneys' offices, Section 6254(f) was amended to prohibit the release of arrestee addresses (their names remain public) to individuals who intend to use the addresses "directly or indirectly" for commercial speech. Pet. App. 21a and n.7. As of July 1, 1996, no person could obtain the address of any individual arrested unless the requester declared under penalty of perjury that the request was made for a "scholarly, journalistic, political, or governmental purpose," or for "investigative purposes" by a licensed private investigator. Cal. Gov't. Code § 6254(f)(3). None of these vague "purposes" were defined, nor did the statute define what it means to "indirectly" sell a product or service.

The official reason for amending Section 6254(f)(3) was to minimize costs. Yet no government studies or evidence support this purpose or explain how any cost savings could occur given that the same information has to be collected for the government-approved purposes. Pet. App. 17a.

United Reporting is a publishing service that provides to its clients the names and addresses of recently arrested individuals, among other information. Pet. App. 11a. United Reporting also publishes the *JAILMAIL Register*, which is distributed to its clients and arrestees. United Reporting's clients are attorneys, insurance companies, drug and alcohol counselors, religious counselors, driving schools, and others. *Id.* These entities use the information for many purposes, including sending free literature to arrestees offering legal, drug, and alcohol counseling, cost information, and statutory and regulatory deadlines and other information concerning the crimes charged. *Id.* The *JAILMAIL Register* includes articles on these same topics.

On July 1, 1996, United Reporting was denied access to public records containing addresses of persons arrested by numerous police and sheriff departments statewide. Faced with the reality of being put out of business based on the exercise of its constitutional rights, United Reporting sought declaratory and injunctive relief under 42 U.S.C. § 1983.

**B. The District Court Correctly Ruled That Section 6254(f)(3) Is a Content-Based Limitation on Commercial Speech That Violates the First Amendment.**

The district court correctly ruled that Section 6254(f)(3) is "a content-based" indirect limitation on commercial speech which implicates the First Amendment. Pet. App. 14a-22a. It invalidated the statute for allowing the government to censor lawful commercial speech, without directly or materially advancing any government interest under a *Central Hudson* analysis. *Id.*, citing *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

In so ruling, the district court noted the possible government discrimination and effect of Section 6254(f) on an arrestee's Sixth Amendment right to obtain competent counsel: "[I]t was state and local law enforcement agencies and district attorneys' offices which proposed this amendment to § 6254." "The statute may . . . have been intended to prevent arrestees from obtaining counsel because law enforcement agencies find it easier to deal with arrestees who are not represented by counsel." Pet. App. 21a and fn. 7. The district court further recognized that arrestees may need immediate legal assistance to prevent them from making self-incriminating statements, to help them obtain bail, and to prepare for any subsequent criminal proceedings. Pet. App. 19a.

In applying the four-part *Central Hudson* test, the district court accepted the parties' agreement that United Reporting's proposed speech is neither illegal nor misleading. Pet. App. 16a. It also found the government's two asserted interests in minimizing costs and protecting the privacy of arrestees to be substantial. The district court concluded, however, that Section 6254(f)(3) failed to satisfy the third and fourth prongs of the test. Pet. App. 17a-22a.

The district court found it doubtful that Section 6254(f)(3) could minimize any costs given that the same information has to be collected and provided to numerous groups for the approved purposes. Pet. App. 17a-22a. Further, increased costs could be charged to commercial users and not infringe speech at all. *Id.*

Likewise, the district court found the purported government interest in protecting arrestee privacy rights was belied by the numerous public uses of the information allowed by Section 6254(f)(3), including widespread publication. Pet. App. 20a-21a. The statute's "exceedingly narrow scope" thus betrayed

its true purpose — to prevent government disapproved solicitation. *Id.*

Relying on *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), and *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (in which this Court invalidated permanent bans on attorney direct mail solicitation as violative of First Amendment rights), the district court concluded the free speech "interest so heavily outweighs any concern that arrestees may find such attorney solicitations offensive that the [government's] justification borders on the disingenuous." Pet. App. 19a. In accordance with *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72 (1983), the district court agreed that arrestees — not the government — should control their own mailboxes, and unwanted direct mail solicitations can be thrown away. *Id.*

### C. The Ninth Circuit Unanimously Affirmed the District Court's Ruling.

Notably, the Attorney General of the State of California did not appeal the district court's judgment to the Ninth Circuit. Pet. App. 26a. Before the Ninth Circuit, the LAPD accepted the district court's finding that Section 6254(f)(3) did not minimize costs — the purported reason for adopting the statute.<sup>1</sup> Instead, the LAPD asserted the government's need to protect arrestee privacy by prohibiting direct mail solicitation and reducing opportunities for commercial interests to create criminal history information banks. Pet. App. 32a.

The Ninth Circuit accepted both government interests as substantial under a *Central Hudson* analysis, but ruled that

1. The LAPD had failed to produce any evidence of cost savings to the district court. Pet. App. 18a and 30a.



Section 6254(f)(3) did not advance either interest "in a direct and material way." Pet. App. 31a, relying on *Rubin v. Coors Brewing*, 514 U.S. 476, 487 (1993), and *Edenfield v. Fane*, 507 U.S. 767 (1993). The LAPD failed to provide any evidence that commercial interests would create "unreliable criminal history information banks," and such speculation and conjecture are insufficient to sustain a restriction on commercial speech. *Id.* at 32a, citing *Coors Brewing*, 514 U.S. at 487.

Further, in rejecting the asserted interest in preventing the "direct intrusion into the private lives and homes" of arrestees, the Ninth Circuit agreed with the district court (and this Court) that such privacy is not invaded by the solicitation itself, but by the discovery of the information that led to the solicitation. *Id.* 33a, citing *Shapero*, 486 U.S. at 476 ("The [privacy] invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery [through a targeted direct-mail solicitation].") The Ninth Circuit also agreed that arrestees — not the government — must decide whether unsolicited information is unwanted and should be thrown away. Pet. App. 33a.

The Ninth Circuit likewise agreed that the Tenth Circuit's decision in *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10<sup>th</sup> Cir.), *cert. denied*, 513 U.S. 1044 (1994), is wrongly decided. *Lanphere*, 21 F.3d 1508, fails to take into account this Court's decision in *Edenfield*, 507 U.S. at 767 (holding that the second prong of *Central Hudson* requires the challenged regulation to advance the state interest "in a direct material way," not merely a direct or "reasonably" direct way), and is in conflict with *Coors Brewing*, 514 U.S. 476. Pet. App. 34a. This Court in *Coors Brewing*, 514 U.S. 476, held that an overall irrationality of a government regulatory scheme, including numerous exceptions that undermine the statute's purported

purpose, results in "little chance" that a regulation can directly or materially advance its aim. *Id.* at 489.

The Ninth Circuit held the myriad public uses of arrest records allowed under Section 6254(f)(3) preclude it from directly and materially advancing any purported government interest in protecting arrestee privacy. Pet. App. 34a-35a. The Ninth Circuit concluded that it is simply not rational for a statute which purports to protect the privacy of arrestees to allow the names and addresses to be published "in any newspaper, article, or magazine in the country so long as the information is not used for commercial purposes." Pet. App. 35a.

### REASONS FOR DENYING THE WRIT

This Court should not waste valuable judicial resources to review the well-reasoned, cogent decision of the Ninth Circuit. The decision is in accordance with decisions from the Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits and numerous district courts, and is based on free speech principles long settled by this Court.

There is no meaningful division in the lower courts on the constitutionality of allowing police to release arrest records for selected public purposes, but not for commercial speech (sections A. and B., *infra*). The morass of unrelated statutes cited by the LAPD in an attempt to manufacture a conflict justifying review by this Court are irrelevant to this case (section C., *infra*). The vast majority (78 of 85 statutes) do not concern arrest records that implicate First and Sixth Amendment rights of arrestees. *See* Pet. App. 1a-5a. Further, the constitutionality of most of the statutes has never been tested.

Of the "Police Report Statutes" (Pet. App. 1a-2a) tested, all recent court decisions strike them down as violating the



increased First Amendment protection afforded commercial speech by this Court in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), *Edenfield*, 507 U.S. 761, and *Coors Brewing*, 514 U.S. 476, among others. Only the Tenth Circuit has upheld such a challenge to an arrest record statute, and *Lanphere*, 21 F.3d 1508, has been soundly criticized. See Pet. App. 33a, fn. 4.

This Court has long prohibited governments from adopting statutes that allow them to monitor and control information flowing into private mailboxes. If allowed to survive, the chilling effect of Section 6254(f)(3) and similar statutes would be far-reaching: governments would be allowed to disapprove uses of public information, selectively withhold records from disfavored or weak groups whose speech they dislike, and censor the flow of information to citizens.

Other constitutional infirmities make this case inappropriate for review as well. Section 6254(f)(3) fails to satisfy the fourth prong of the *Central Hudson* test (which the Ninth Circuit did not reach), sweeps within its vague terms speech that is not commercial, and denies equal protection and due process of law. Pet App. 36a.

Further, article I, section 2 of the California Constitution provides even broader speech protections than the First Amendment. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980) (California provides for broader free speech and forum protection than the First Amendment requires); *Blatty v. New York Times*, 42 Cal. 3d 1033, 1041 (1986) (California's free speech guarantee independently establishes a zone of protection broader than the First Amendment). Given the California Supreme Court's determination that there is an overriding public interest in identifying and notifying the public of arrestees charged with crimes, California's broader free speech guarantee provides an independent basis for invalidating Section 6254(f)(3).

#### **A. The Circuit and District Courts Have Consistently Invalidated Government Imposed Content-Based Restrictions on Commercial Speech.**

Regulations that single out a business solely on the basis of the content of the material it may sell or distribute presumptively violate the First Amendment and can be justified, if at all, only by a compelling government interest. *Minneapolis Star v. Minnesota Dept. of Revenue*, 460 U.S. 575 (1983); *Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (finding a regulation improperly "singled out speech on a particular subject for a financial burden it places on no other speech and no other income"). To justify a content-based restriction, "the State must show that its regulation is necessary to serve a compelling State interest and is narrowly drawn to achieve that end." *Arkansas Writer's Project v. Ragland*, 481 U.S. 221, 229-230 (1987). If commercial and non-commercial speech are implicated together, this higher burden must be met as well. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980).

The government likewise bears the burden of justifying any restriction on purely commercial speech. *Bolger*, 463 U.S. at 71 n.20 (1983). This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to uphold a restriction on commercial speech must demonstrate the harms the government recites are real and the restriction will in fact directly alleviate them to a material degree. *Edenfield*, 507 U.S. at 768, *Coors Brewing*, 514 U.S. 476. Federal courts will not construe state legislative enactments to create constitutionality. *Virginia v. American Bookseller's Association*, 484 U.S. 383, 397 (1988) ("We will not rewrite a state law to conform to its constitutional requirements.")

Here, the LAPD cites 11 legal challenges to "Police Report Statutes" (including accident report statutes) to support its

contention that a conflict exists in the lower courts over whether the First Amendment allows governments to release selectively police reports for some public purposes, but not for commercial speech. Pet. 7, Pet. App. a1-a2. Only seven of these statutes even arguably concern arrest records.<sup>2</sup> Of those seven, only the Colorado statute has been upheld by the Tenth Circuit in *Lanphere*, 21 F.3d 1508.

Eight of the statutes have been consistently struck down on First Amendment grounds by the Fifth, Ninth, and Eleventh Circuits, and numerous district courts in California, Florida, Georgia, Kentucky, New Mexico, and Texas. *Id.* See *Innovative Database Systems v. Morales*, 990 F.2d 217 (5th Cir. 1993); *Speer v. Miller*, 15 F.3d 1007 (11 Cir. 1994), *on remand*, 864 F. Supp. 1294 (N.D. Ga. 1994); *United Reporting Publishing Corp. v. California Hgwy Patrol*, 146 F.3d 1133 (9th Cir. 1998), *aff'g*, 946 F. Supp. 822 (S.D. Cal. 1996); *Statewide Detective Agency v. Miller*, No. 96-Civ-1033 (WBH), Order (N.D. Ga. Aug. 12, 1998), *aff'd*, 115 F.3d 904 (11 Cir. 1997); *Babkes v. Satz*, 944 F. Supp. 909 (S.D. Fla. 1996); *Amelkin v. Commissioner Dep't of St. Police*, 936 F. Supp. 428 (W.D. Ky. 1996), *on remand from Amelkin v. McClure*, No. 94-6161, 1996 U.S. App. LEXIS 1414 (6th Cir. Jan. 9, 1996); *Moore v. Morales*, 843 F. Supp. 1124 (S.D. Tex. 1994), *on appeal of separate issue, aff'd in part and rev'd in part*, 63 F.3d 358 (5th Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996); *LaSalle v. Udall*, Civ. A. No. 94-0404-M, Unpublished Opinion and Order (D.N.M. Feb. 16, 1996).<sup>3</sup>

2. As previously noted, statutes that concern accident or traffic reports do not implicate the First and Sixth Amendment rights of arrestees to receive information concerning the hiring of competent legal counsel.

3. Of the remaining "Police Report Statutes," Oklahoma Statute § 24 A.8 mandates that arrestee records shall be made public. Indiana

(Cont'd)

In *Northern Kentucky Chiropractic v. Ramey*, No. 95-5645, 1997 U.S. App. Lexis 1734 (6th Cir. Jan. 29, 1997), and *Amelkin v. McClure*, No. 94-6161, 1996 U.S. App. LEXIS 1414 (6th Cir. Jan. 9, 1996), two district courts in the Sixth Circuit also invalidated prohibitions on the commercial use of public records on First Amendment grounds, but the decisions were remanded to comply with notice provisions of Fed. R. Civ. P. 65.

In *Ficker v. Curran*, 119 F.3d 1150 (4th Cir. 1997), the Fourth Circuit also recently affirmed a district court's invalidation of a statute forbidding direct-mail solicitation of criminal and traffic defendants by lawyers within thirty days of arrest. It found that the alleged harm to the profession's image was largely speculative, and could not justify the restriction on the free flow of information to individuals *at a time when such information is critically needed*. *Id.* at 1154-1155.

(Cont'd)

Code § 5-14-3-5 (cited in "Miscellaneous Statutes") likewise requires public disclosure of arrestee information within twenty-four hours of the suspected crime. Arizona Revised Statute § 28-667 (1998), Florida Statutes 316.066 and 327.301 (1998), and Hawaii Revised Statute § 286-172 (1997), concern accident reports, not arrest records, and have never been constitutionally tested. *But see Babkes*, 944 F. Supp. 909, striking down a Florida traffic citation statute on First Amendment grounds. Maryland Code Annotated § 10-616 (1997) applies to numerous types of records, not just arrest records, and has never been constitutionally tested.

Petitioner also erroneously relies on "General Public Record Statutes." Pet. App. 2a. The constitutionality of these statutes has never been tested, and such records do not implicate the overriding public interest in disclosing arrest information to the public or the federal constitutional right to retain competent counsel. Similarly, Petitioner relies on statutes concerning public assistance, elections, employee financial disclosures, trade secrets, and privileged information that simply have no bearing on the arrest records at issue here.



Likewise, in *Pearson v. Edgar*, 153 F.3d 397 (7th Cir. 1998), the Seventh Circuit, upon vacation and remand from this Court, affirmed a district court decision striking down an Illinois statute that allowed citizens to opt out of real estate solicitations as an impermissible restriction on commercial speech. In reconsidering its decision in light of *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), the Seventh Circuit found no evidence of any "solicitation harms" or threats to residential privacy from real estate solicitations, and concluded the restriction did not advance such interests in a direct or material way. *Id.* at 404. It further noted that the state, not homeowners, had made the distinction between real estate and other solicitations without a logical privacy-based reason. After *Discovery Network*, 507 U.S. 410, 44 *Liquormart, Inc.*, 517 U.S. 484, and *Coors Brewing*, 514 U.S. 476, the Seventh Circuit concluded that courts can no longer place residential privacy interests above speech restrictions absent some showing that the restriction fits the justification, and that severe underinclusiveness of a statute is fatal.<sup>4</sup> *Id.* at 404-405.

As these cases demonstrate, recent decisions by courts in the Fourth, Fifth, Sixth, Seventh, Ninth and Eleventh Circuits consistently invalidate statutes like Section 6254(f)(3) on First Amendment grounds.

4. In *Condon v. Reno*, 155 F.3d 453 (1998), a case cited by the LAPD, the Fourth Circuit questioned whether individuals can ever have a right of privacy in their names and addresses when "pervasive schemes of regulation," like those that pertain to vehicle accident and arrest records, are required to be kept by law.

**B. The LAPD Relies On The Aberrant Decision of The Tenth Circuit and Two State Court Decisions to Manufacture A "Conflict," All of Which Predate the Increased Protection Afforded Commercial Speech By This Court.**

The LAPD relies on the Tenth Circuit's aberrant decision of *Lanphere*, 21 F.3d 1508, and two state court decisions, to manufacture a "conflict." Pet. 6-11. *Lanphere*, 21 F.3d 1508, must now be viewed as wrongly decided, and contains a strong dissent by the Honorable Ruggero J. Aldisert, Senior Circuit Judge for the Third Circuit sitting by designation (*id.* at 1516-1520). See Pet. App. 33a-34a, n.4. The Tenth Circuit in *Lanphere* admits that Colorado's statute conditions access to public arrest records upon whether the resulting speech is to be commercial, and is therefore content-based. 21 F.3d at 1511. It further analogizes the statute to a "case of a general law singling out a disfavored group on the basis of speech content." *Id.* at 1514. Nevertheless, the Tenth Circuit inexplicably concludes the statute advances Colorado's interest in "lessening the danger of solicitor abuse and, relatedly, maintaining public confidence in the judicial system" in a "reasonably direct way," sufficient to survive a *Central Hudson* analysis. *Id.* at 1514. The holding of *Lanphere* ignores this Court's teachings in *Shapero*, 486 U.S. 466 (invalidating a ban designed to cut off solicitation when lesser measures were more appropriate in light of the commercial speech at issue<sup>5</sup>); *Discovery Network*, 507 U.S. 410 (holding unconstitutional a regulation prohibiting street newsracks for commercial handbills while continuing to allow them for other publications as content-based); *Edenfield*, 507

5. Importantly, Section 2721 of Title 18 of the United States Code points out a less speech restrictive alternative to Section 6254(f)(3)'s ban on commercial speech, *i.e.*, procedures that allow arrestees themselves to opt out of any solicitations. *Accord*, Arkansas Code Ann. § 27-14-412 (Michie 1997); Arizona Revised Statutes § 28-452 (1998).



U.S. 761 (holding unconstitutional restrictions that only "reasonably" directly advance a substantial government interest); and *Coors Brewing*, 514 U.S. 476 (holding unconstitutional statutes whose exceptions undermine and counteract the government interest for which the statute is adopted). No other court has followed it.

The LAPD's reliance on two state court decisions that involve accident reports and predate *44 Liquormart, Inc.*, 517 U.S. 484, and *Coors Brewing*, 514 U.S. 476, is equally misplaced. *DeSalvo v. Louisiana*, 624 So. 2d 897 (La. 1993), *cert. denied*, 510 U.S. 1117 (1994), treats a ban on commercial use of accident records as a content-neutral time, place and manner restriction in violation of *Regan v. Time*, 468 U.S. 641 (1984) (a content-based regulation can not qualify as a valid time, place, or manner restriction). *Walker v. South Carolina Department of Highways & Public Transportation*, 466 S.E. 2d 346 (1995), treats a ban on commercial use of accident records as a selective denial of access to information rather than a restraint on speech, in direct contradiction of *all* of the above cases.<sup>6</sup>

6. All courts that have addressed statutes similar to section 6254(f) conclude that a First Amendment challenge is appropriate where a state conditions access to public records on the use to be made of the records. *Babkes v. Satz*, 944 F. Supp. at 911 (by restricting the use to which public arrest information can be put, the statute implicates the First Amendment's protection of commercial speech); *Speer v. Miller*, 15 F.3d at 1010; *Speer v. Miller*, 864 F. Supp. at 1296; *Lanphere*, 21 F.3d at 1513; *Moore v. Morales*, 843 F. Supp. 1124; *Innovative Database Systems v. Morales*, 990 F.2d 217; *Lavalle v. Udall*, No. 94-0404 (D.N.M. 1996); *Amelkin v. Cox*, 936 F. Supp. 428 (W.D. Ky. 1996).

### C. Exceptions To Statutes That Undermine Their Purpose, Like Those In Section 6254(f)(3), Can Not Survive First Amendment Scrutiny.

The LAPD's further contention that the "conflict" extends to such cases as *Valley Broadcasting Co. v. United States*, 107 F.3d 1328, *cert. denied*, 118 S. Ct. 1050 (1998) (invalidating a federal ban on casino gambling because the statute permits other forms of gaming advertisements) and *Greater New Orleans Broadcasting Ass'n v. United States*, 149 F.3d 334, *pet. for cert. pending*, No. 98-387 (Sept. 2, 1998) (opposite holding), is meritless. This Court has already held in *Coors Brewing*, 514 U.S. 476, that statutes containing exceptions to bans on publication of information that undermine their purpose can not materially advance the purpose of the statute under the *Central Hudson* test. *Valley Broadcasting*, 107 F.3d 1328, expressly follows *Coors Brewing*, 514 U.S. 476, and *Edenfield*, 507 U.S. 761. *Greater New Orleans Broadcasting Ass'n*, 149 F.3d 334, does not.<sup>7</sup>

The conflicting decisions on election statutes are equally inapplicable to Section 6254(f)(3) which implicates both First and Sixth Amendment rights of arrestees. Pet. App. 12. As the District of Columbia Circuit noted, election statutes contain valuable information collected by *private* political committees that would not be public absent government compelled disclosure for limited purposes. *FEC v. International Funding Institute*, 969 F.2d 1110, 1114-1116 (D.C. Cir.), *cert. denied*, 506 U.S. 1001 (1992). Moreover, this case is closer to *FEC v.*

7. Even dissenting Justice Politz recognized in *Greater New Orleans Broadcasting Ass'n v. United States*, 69 F.3d 1296, 1304 (5th Cir. 1995), that the gambling ban is "so pockmarked with exceptions and buffeted by countervailing state policies that it provides, at most, a very minimum support for the asserted interest." This Court remanded the majority's decision for reconsideration in light of *44 Liquormart*, 517 U.S. 484.

*Political Contributions Data*, 943 F.2d 190 (2d Cir. 1991), in which the Second Circuit construed the Federal Election Commission Act (2 U.S.C. §§ 437 *et seq.*) to protect a commercial publication listing campaign contributors to avoid First Amendment violations. United Reporting's *JAILMAIL Register*, like the publication at issue in *FEC*, 943 F.2d 190, is akin to an informational pamphlet, and United Reporting is likewise not engaged in solicitation of arrestees for legal services.

**D. The Unanimous Decision of the Ninth Circuit and The District Court is Correctly Decided.**

The unanimous decision of the Ninth Circuit, affirming the district court, is correctly decided and consistent with all recent court decisions invalidating similar statutes (*see* sections A. through C., *supra*). It is not contrary to this Court's First Amendment precedents, nor did the Ninth Circuit treat Section 6254(f)(3) as a complete prohibition on United Reporting's speech, as the LAPD contends. Pet. 13-14. The Ninth Circuit treated Section 6254(f)(3) as the content-based, discriminatory restriction that it is.

1. *Arrest Records Are Public in California Pursuant to the California Public Records Act, And Are Protected By The First Amendment and Article I, Section 2 of the California Constitution As Well.*

The LAPD's contention that arrest records need not be made public in California at all, and that restrictions on releasing government records do not violate the First Amendment, is wrong. California's Legislature and its Supreme Court have rejected the police's ability to keep arrest records secret. *County of Los Angeles*, 18 Cal. App. 4th at 596-598 (public disclosure is based on the fundamental need of the public (not just the press) to monitor police and criminal activity); *Loder*, 17 Cal. 3d at 863.

Moreover, access to information concerning the functioning of government receives strong constitutional protection under the First Amendment and article I, section 2 of the California Constitution. *See, e.g., Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980) (First Amendment goes beyond protection of self-expression to prohibit government from limiting the stock of information from which the public may draw; it also protects the right to receive information); *Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106, 111 and n.4 (1992) (same under California Constitution). Beginning in 1980, this Court made clear that the First Amendment prevents denials of access to public information necessary to an informed democracy absent a more compelling interest.<sup>8</sup> *See, e.g., Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984). This protection has been increasingly extended to afford access to criminal justice records<sup>9</sup> and non-judicial, arrest records.<sup>10</sup>

8. Dissenting Judge Caldisert in *Lanphere*, 21 F.3d 1508, found that access to judicial and law enforcement records is a compelling interest that cannot be overridden by concerns of preserving the integrity of law enforcement. *Id.* at 1519. It would be "disingenuous," he stated, to recognize as a compelling interest an indirect speech regulation that could not lawfully be allowed as a direct regulation. *Id.*

9. *See United States v. Hubbard*, 650 F.2d 293, 315 (D.D.C. 1980) (access to government records is important to the overriding concern with preserving the integrity of law enforcement and the judicial processes); *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985) (common law right to inspect and copy judicial records); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989) (First Amendment right of access to records of criminal cases); *Oregonian Publishing Co. v. U.S. Dist. Court for Dist. of Or.*, 920 F.2d 1462, 1465 (9th Cir. 1990); *Seattle Times v. U.S. Dist. Court for W.D. of Wash.*, 845 F.2d 1513, 1515 (9th Cir. 1988); *Associated Press v. United States Dist. Court*, 705 F.2d 1143 (9th Cir. 1983).

10. *Student Press Law Center v. Alexander*, 778 F. Supp. 1227, 1234 (D.D.C. 1991) (campus police arrest and incident reports); *Caledonian-*  
(Cont'd)



Under the California Public Records Act as well, access to public records cannot be denied unless allowing access would undermine individual rights, is demonstrably injurious to the public good, and is sufficiently substantial enough to override the fundamental right of access. *See, e.g., Craemer v. Superior Court*, 265 Cal. App. 2d 216, 222 (1968). Further, the Act requires that if a record is public, "all persons have [a fundamental right of] access thereto. . . ." *Los Angeles Police Dept. v. Superior Court*, 65 Cal. App. 3d 661, 668 (1977), emphasis in original and citations omitted.

Under Section 6254(f)(3), arrestee addresses are public, except to a targeted group whom the California Peace Officers Association feels are unfairly "profiting from the misfortunes" of others. This group is excluded purely because of government disapproval of commercial speech (as all courts deciding such cases have found). Pet. App. 33a, and cases in fn. 5, *supra* (use of public information cannot be punished under the guise of access). Such discrimination cannot be constitutionally sanctioned under either the First Amendment or article I, section 2 of the California Constitution. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510 (1995) (government discrimination against private speech based on its message is constitutionally intolerable; it is axiomatic that government may not regulate speech based on its substantive content).

The LAPD's reliance on decisions that predate the First Amendment right of access underscored by this Court in 1980

(Cont'd)

*Record Publishing Co. v. Walton*, 573 A.2d 296, 299 (Vt. 1990) (statutory public access to arrest records is "intended to mirror the constitutional right of access"); *Speer v. Miller*, 864 F. Supp. 1294 (N.D. Ga. 1994), (Caldisert, dissenting) (access to arrest records plays a significant positive role in the actual functioning of the judicial process, and a qualified First Amendment right of access should attach).

and are irrelevant is misplaced. *Houchins v. KQED*, 438 U.S. 1 (1978), involved a denial of access to non-public prisons due to security and other penological risks associated with incarcerated inmates. *Nixon v. Warner Communications*, 435 U.S. 589 (1978), concerned tapes governed by the Presidential Recordings and Materials Preservation Act (44 U.S.C.S. § 2107) played as trial evidence. The Act provided for a legislative means of public access to the preserved tapes, and there was no claim that the press was precluded from listening to the tapes and publishing their content as it saw fit. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), addressed not public information, but private information compelled through civil discovery procedures. *Zemel v. Rusk*, 381 U.S. 1 (1965), concerned the Passport Act of 1926, and the right to travel to Cuba when diplomatic relations had been broken off.

2. *As a Content-Based Restriction On Commercial Speech, Section 6254(f)(3) Violates the First Amendment.*

For more than two decades, this Court has underscored that "commercial messages play a central role in public life," and has developed law to insure that consumers have access to accurate information about the availability of goods and services. *44 Liquormart*, 116 S. Ct. 1495; *Coors Brewing*, 514 U.S. 476; *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (private economic decisions must be intelligent and well informed; to this end, the free flow of commercial information is indispensable). This Court has rejected paternalistic assumptions that the public will use truthful commercial information unwisely, and has found that people will perceive their own best interests if well enough informed. *44 Liquormart*, 134 L. Ed. 2d at 770 ("It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely



available, that the First Amendment makes for us.”) It has warned that government bans targeting truthful commercial messages rarely protect consumers from harm, and are rarely upheld because they often serve only to obscure an underlying governmental policy that could be implemented without regulating speech. 44 *Liquormart*, 134 L. Ed. 2d at 728. For this reason, for more than 20 years this Court has invalidated bans on direct mail solicitation by lawyers and other professionals for the public good.<sup>11</sup> *Shapero*, 486 U.S. at 476.

Similarly, as a content-based restriction on commercial speech, Section 6254(f)(3) can not survive the third prong of the *Central Hudson* test. Pet. App. 33a-36a. The Ninth Circuit correctly found the myriad public uses of arrest records allowed under Section 6254(f)(3) preclude it from directly and materially advancing any purported government interest in protecting arrestee privacy.<sup>12</sup> Pet. App. 34a-35a. Further,

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11. *Accord*, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (attorney advertising may not be subject to blanket suppression); *Zauderer v. Office of Disciplinary Council*, 471 U.S. 626 (1985) (attorney advertising protected); *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91 (1990); (same); *Ibanez v. Florida Dept. of Business and Professional Regulation*, 512 U.S. 136 (1994) (same). *Cf. Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995), wherein the Court found that a 30-day ban on direct mail solicitations was no more than a *short temporal ban* and would provide reasonable protection for *accident victims* from the detrimental effects of solicitation letters. Section 6254(f)(3) is *not a temporal ban*, and concerns arrestees who are charged with crimes, facing short statutory deadlines, and are constitutionally guaranteed the right to competent counsel.

12. Further, Section 6254(f)(3) is not only arbitrarily chilling speech and the right to receive information, but is invading United Reporting’s privacy by requiring it to declare under penalty of perjury, in advance of publication, for government approval, what the use of the information will be.

California’s Supreme Court and its Legislature have determined that there is an overriding public interest in allowing citizens to identify who in their communities has been arrested, and for what crimes, that trumps arrestee privacy rights. *Loder*, 17 Cal. 3d 859; *County of Los Angeles*, 18 Cal. App. 4th at 596-598. Complete and accurate identification of arrestees can only occur by making addresses available.

Thus, the unconstitutional government paternalism in controlling arrestees’ private mailboxes allowed by Section 6254(f)(3) cannot survive constitutional scrutiny under any analysis.<sup>13</sup> Moreover, alternatives (such as opt out provisions) exist that do not restrict speech.

#### **E. Section 6254(f)(3) Also Violates the First and Fourteenth Amendments on Grounds Not Reached By the Ninth Circuit.**

Section 6254(f)(3) also operates as a forbidden prior restraint on speech. Government systems which require permission to speak are prior restraints. *Cantwell v. Connecticut*, 310 U.S. 296, 301-02 (1940) (a statute that proscribes solicitation for specific purposes unless approved by the government is a prior restraint on speech). Under section 6254(f)(3), United Reporting can arguably obtain lawful access to arrestee addresses under the “journalistic” purpose,

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13. Section 6254(f)(3) also fails the remaining prong of the *Central Hudson* test as the District Court found. Pet. App. 22a. For the same reasons, it is a “substantially excessive” burden on protected speech, and disregards more precise means of achieving the asserted cost or privacy goals. *Board of Trustees v. Fox*, 492 U.S. 469, 470 (1989) (this prong requires the government to prove its goal is substantial and the cost carefully calculated); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (even legitimate and substantial purposes are trumped when less drastic means for achieving the same basic purpose are available).

but is restrained from engaging in truthful speech associated with commercial solicitation by the threat of criminal prosecution.

Further, Section 6254(f)(3) contains no judicial safeguards for challenging the government's decision. *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 764 (1988) (government may not condition speech upon obtaining permission from a government official in that official's boundless discretion). Instead, the government can directly prosecute any person it decides used arrestee addresses for a purpose that is not "scholarly, journalistic, political, or governmental" or "for investigation," or to "directly or indirectly" "sell a product or service," despite the vagueness of these undefined terms.<sup>14</sup> Section 6254(f)(3) is equally unconstitutional on vagueness grounds. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

Section 6254(f)(3) is also unconstitutionally overbroad in that it sweeps within its reach non-commercial speech that might "indirectly" relate to the selling of a product or service, including United Reporting's *JAILMAIL Register*. It is underinclusive as well in that it restricts publication by United

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14. As United Reporting demonstrated to the Ninth Circuit and district court, it is unsure if its publications fall within the journalist exception to Section 6254(f)(3). A wrong guess arguably subjects United Reporting's owner and others to criminal prosecution, and chills substantial speech in violation of the First Amendment.

Further, similar to a newspaper, United Reporting has no control over how its recipients or clients use the information it publishes, or whether it will be used for a commercial purpose. United Reporting and its representatives cannot know whether signing the required declaration will place them in peril of being prosecuted for perjury for "indirectly" engaging in commercial speech. Because of its vagueness and uncertainty, Section 6254(f)(3) denies due process of law. *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961).

Reporting, but not other businesses which access, publish and profit from the same information. Section 6254(f)(3) draws an unconstitutional line to differentiate access that violates United Reporting's equal protection rights. *Plyler v. Doe*, 457 U.S. 202, 216-217 (1982); *Special Programs, Inc. v. Courtier*, 923 F. Supp. 851, 857 (E.D. Va. 1996) (a statute's infringement need not violate the First Amendment directly; its differential effect upon various speakers can in and of itself violate the Equal Protection Clause).

## CONCLUSION

For the forgoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 98-678

IN THE  
Supreme Court of the United States

OCTOBER TERM, 1998

Los Angeles Police Department,  
*Petitioner,*

v.

United Reporting Publishing Corp.,  
*Respondent.*

On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

**REPLY OF THE PETITIONER**

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## REPLY OF THE PETITIONER

The question presented by this case is whether, under the First Amendment, the government may release official records only for specified, noncommercial purposes. Respondent collects the names and addresses of California arrestees from state law enforcement agencies and sells that information to "attorneys, insurance companies, drug and alcohol counselors, religious counselors, driving schools, and others." BIO 5. Cal. Gov't Code 6254, however, would prohibit Respondent from collecting addresses from the state for commercial purposes. The statute permits the release of address information only for "a scholarly, journalistic, political, or governmental purpose, or [for] investigation purposes by a licensed private investigator." Cal. Gov't Code 6254(f)(3). The Ninth Circuit held that Section 6254 is unconstitutional because it violates Respondent's First Amendment right to engage in commercial speech.<sup>1</sup>

Certiorari is warranted for several reasons. *First*, this Court's long-standing practice is to review decisions invalidating state statutes as unconstitutional. *Second*, the lower courts are divided over the question presented. Respondent acknowledges a split between the Ninth and Tenth Circuits, and also fails to distinguish persuasively two state supreme court decisions holding that the government may forbid the commercial use of accident reports. *Third*, the decision below is erroneous under this Court's precedents: Section 6254 does not restrict speech but instead is a valid exercise of the government's wide discretion in releasing government records. *Finally*, we recommend granting certiorari rather than holding this Petition pending the disposition of two other commercial speech cases.

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<sup>1</sup> The Ninth Circuit did not address the state law and Fourteenth Amendment arguments raised by Respondent. *See generally* BIO 10, 24 & n.14. These arguments are beyond the scope of the question presented, and Respondent did not raise any of them through a conditional cross-petition for certiorari.



**CERTIORARI IS WARRANTED  
FOR REASONS UNRELATED TO  
THE MERITS OF THE RULING BELOW**

1. Certiorari is warranted because the Ninth Circuit invalidated a state statute on federal constitutional grounds and this is an issue of widespread importance. Respondent fails to address this principal reason for granting certiorari. When the federal courts void a statute of a sovereign state on federal constitutional grounds, comity practically demands review in this Court. Certiorari particularly is warranted because *three* federal courts of appeals, together with several district courts, have invalidated indistinguishable state statutes based on the same rationale as the decision below. Pet. 8. The holdings of these courts apply equally to invalidate more than eighty statutes enacted by the federal government and nearly forty states. Pet. 3; Pet. App. 1a-5a. When, as here, the circuits furthermore are in conflict on the question presented, there simply is no basis for denying certiorari.

2. Certiorari is warranted because the decision below conflicts with rulings of the Tenth Circuit, the Louisiana Supreme Court, and the South Carolina Supreme Court. Respondent effectively recognizes that the lower courts are in conflict over the question presented and does not suggest that further percolation of the issue is warranted. The BIO acknowledges (at 8) the Ninth Circuit's conclusion "that the Tenth Circuit's decision in *Lanphere & Urbankiak v. Colorado*, 21 F.3d 1508 (10th Cir.), *cert. denied*, 513 U.S. 1044 (1994), is wrongly decided." See also BIO 10 (explaining that the Ninth Circuit "soundly criticized" *Lanphere*). The BIO also emphasizes (at 16) that the South Carolina Supreme Court's decision in *Walker* stands "in direct contradiction" to multiple decisions invalidating commercial use restrictions. Moreover, several courts and judges have recognized that the Tenth Circuit's and Louisiana Supreme Court's rulings on this question squarely conflict with decisions of the Fifth and Eleventh Circuits. *Babkes v. Satz*, 944 F. Supp. 909, 913 n.4 (S.D. Fla. 1996) (declining to follow *Lanphere* because "*Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994), is binding precedent on this Court"); *Amelkin v. Com-*

*missioner*, 936 F. Supp. 428, 429 (W.D. Ky. 1996) ("There is a conflict in the decisions of the Eleventh Circuit and the Tenth Circuit as evidenced by the decisions in *Speer v. Miller* . . . and *Lanphere* . . ."); *Speer v. Miller*, 864 F. Supp. 1294, 1301 (N.D. Ga. 1994) (explaining that the Eleventh Circuit's decision in *Speer* "is in conflict with the Tenth Circuit's" decision in *Lanphere*); see also *Northern Ky. Chiropractic v. Ramey*, No. 95-5645, 1997 U.S. App. LEXIS 1734 (6th Cir. Jan. 29, 1997) (Nelson, J., concurring) (*Lanphere* and *DeSalvo v. Louisiana*, 624 So. 2d 897 (La. 1993), *cert. denied*, 510 U.S. 1117 (1994), conflict with *Speer* and *Innovative Database Sys. v. Morales*, 990 F.2d 217 (5th Cir. 1993)).

Only two of Respondent's arguments contest the existence of a square conflict. First, Respondent asserts that Cal. Gov't Code 6254(f)(3), which involves arrest records, "implicates the First and Sixth Amendment rights of arrestees to receive information concerning the hiring of competent legal counsel." BIO 12 n.2, 16. By contrast, the statutes at issue in *DeSalvo* and *Walker* (although not *Lanphere*) restrict the release of *accident* records. BIO 9, 16. But there is no reason to believe that the Louisiana or South Carolina Supreme Courts would reach a different result if confronted with a prohibition on the commercial use of arrest (as opposed to accident) records. Neither the decision below nor the rulings in *DeSalvo* and *Walker* rely in any way on the rights of arrestees.<sup>2</sup> Instead, *DeSalvo* and *Walker* rely principally on this Court's precedents granting the government wide discretion in releasing official records. Thus, the court in *Walker* did not even believe that it was necessary to conduct a First Amendment inquiry, but concluded instead that "the statute in question regulates only access to information; it in no way inhibits Walker's exercise of her free speech

<sup>2</sup> Respondent relies on the district court's statement that Section 6254 "may . . . have been intended to prevent arrestees from obtaining counsel." BIO 6; Pet. App. 21a. The Ninth Circuit did not adopt this aspect of the district court's reasoning. As the Petition explains (at 6 n.2), the district court's suggestion furthermore is unfair and inaccurate: Section 6254(f)(3) applies equally to restrict the release of crime victims' addresses,

rights in the form of direct mail to prospective clients.” 466 S.E.2d at 348 (citing *Houchins v. KQED*, 438 U.S. 1 (1978); *Zemel v. Rusk*, 381 U.S. 1 (1965)). The court in *DeSalvo* took the view that “[a] less stringent test applies . . . when the regulation does not flatly prohibit or restrict commercial speech because of its content but indirectly results in a stricture upon the flow of information or ideas.” 624 So. 2d at 900. Moreover, the free speech analysis in *DeSalvo* addressed the First Amendment rights of *direct* recipients of government records, such as Respondent, who seek to sell those records for a profit. That analysis is unchanged no matter what type of record is in question and no matter who (*i.e.*, whether accident victims or arrestees) the statute affects *indirectly*.<sup>3</sup>

Respondent also invokes this Court’s decisions in *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996), and *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), as signaling “the increased protection afforded commercial speech.” BIO 9-10. But nothing in *44 Liquormart* or *Coors Brewing* would lead the Tenth Circuit, Louisiana Supreme Court, and South Carolina Supreme Court to revisit their holdings.<sup>4</sup> As we explained above, the lower courts have divided over the First Amendment’s application to public records statutes. At most, such statutes impose indirect restrictions on speech. *44 Liquormart* and *Coors Brewing*, by contrast, both involved direct prohibitions on speech and neither broke substantial new ground in First Amendment jurisprudence. *44 Liquormart* invalidated a ban on advertising liquor prices except at the point of sale as “a blanket prohibition against truthful, nonmisleading speech about a lawful product.” 517 U.S. at 504. *Coors Brewing Co.*

<sup>3</sup> On the merits, Respondent’s assertions regarding arrestee rights are erroneous. Arrestees have no greater First Amendment right than accident victims to receive information. Moreover, the Sixth Amendment right to counsel is not implicated by Respondent’s sales to “insurance companies, drug and alcohol counselors, religious counselors, driving schools and others,” which “use the information for many purposes, including sending free literature to arrestees offering legal, drug, and alcohol counseling.” BIO 5.

<sup>4</sup> In point of fact, the South Carolina Supreme Court’s decision in *Walker* post-dates *Coors Brewing Co.*

invalidated a federal ban on the display of alcohol content on beer labels. Both decisions applied the *Central Hudson* analysis, a point the Court made with particular force in *Coors Brewing Co.* (*see* 514 U.S. at 482 n.2), which has been settled since 1980.

## CERTIORARI IS WARRANTED BECAUSE THE RULING BELOW IS ERRONEOUS

1. Section 6254 is not an invalid restriction on commercial speech. Notwithstanding the length of the BIO, Respondent never explains how Section 6254 restrains commercial speech. The statute restricts only Respondent’s acquisition of arrest records. That restriction, like any other law restricting the acquisition of a product, does not trigger First Amendment scrutiny. “The right to speak and publish does not carry with it the unrestrained right to gather information.” *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965). Instead, “the test for identifying commercial speech” is whether the subject of regulation “propose[s] a commercial transaction.” *Board of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989). Respondent “proposes a commercial transaction” only by advertising arrest records for sale. The Petition explained, and the BIO does not contest, that Section 6254 does not restrict Respondent’s advertising.

Respondent therefore may be asserting that Section 6254 has an impermissible *indirect* effect on commercial speech. Specifically, if Section 6254 takes effect, Respondent may elect not to advertise that it has address information available for sale. In addition, Respondent’s customers (including lawyers, counselors, and driving schools) may not acquire addresses from Respondent and, in turn, may not mail advertisements to arrestees. But any burden imposed by Section 6254 in this respect is minimal, and Respondent in any event lacks standing to raise the latter claim. The statute does not prevent Respondent and its customers from acquiring address information from other sources and then engaging in the identical speech. Moreover, there can be no question that California constitutionally could prohibit completely the release of



address information, thereby imposing the identical burden on the speech of Respondent and its customers.<sup>5</sup>

This Court already has confronted, and sustained, statutes creating such indirect burdens on speech. Specifically, the Court has concluded that restrictions on the release of government records are a matter of "legislative grace" even when they have incidental effects on speech. Pet. 14-15. Thus, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1989), held that courts may prohibit the publication of information obtained through court-ordered discovery. In *Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989), the Court *encouraged* states to restrict access to government records as an alternative to banning speech:

To the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release. The government may classify certain information, establish and enforce procedures ensuring its redacted release, and extend a damages remedy against the government or its officials where the government's mishandling of sensitive information leads to its dissemination. Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts. . . . *Cox Broadcasting [v. Cohn]*, 420 U.S. 469, 496 (1975)] ("If there are privacy interests to be protected in judicial proceedings,

<sup>5</sup> Respondent's argument that "California's Legislature and its Supreme Court have rejected the police's ability to keep arrest records secret" (BIO 18 (citing *County of Los Angeles v. Superior Court*, 18 Cal. App. 4th 588, 594 (1993))) is a *non sequitur*. As the district court acknowledged, the California legislature could under the First Amendment adopt a statute prohibiting the release of arrestee addresses. Pet. App. 14a. The state court of appeals' decision in *County of Los Angeles* merely addressed as a "question of statutory construction" whether a predecessor version of Section 6254 required the disclosure of various records. 18 Cal. App. 4th at 594. The further question whether the California State Constitution requires the release of address information (*see generally* BIO 10) is neither before this Court nor relevant to the merits of the Ninth Circuit's decision.

the States must respond by means which avoid public documentation or other exposure of private information.").

Respondent summarizes the facts of some of these cases (BIO 20-21) but fails to address at all the legal principle they embody. And, although Respondent purports to cite contrary decisions (BIO 19-20 & nn.9-10), each of those involved records of court proceedings, which (as the district court recognized) represent a unique exception based on the public's right to open trials. Pet. App. 13a n.1.

2. Section 6254 is not irrational. The principal basis for the decision below, which the BIO repeats, is that Section 6254 is "irrational" and therefore invalid. The Ninth Circuit reached this conclusion only by making two assumptions: (i) that the statute permits "journalists, academicians, curiosity seekers, and other noncommercial users [to] peruse and report on arrestee records" (Pet. App. 33a); and (ii) that "the names and addresses of the same" will be "published in any newspaper, article, or magazine in the country" (*id.* 35a). But both of those assumptions are wrong, and Respondent no longer defends them. First, Section 6254 does not permit the release of address information to "curiosity seekers" and "other noncommercial users": the statute permits disclosure only for "a scholarly, journalistic, political, or governmental purpose, or [for] investigation purposes by a licensed private investigator."<sup>6</sup> Second, as the Petition explained, the press frequently reports the names of arrestees, but experience teaches that they rarely publish arrestee *addresses*, which is the piece of information withheld from Respondent under Section 6254.

This case therefore is very different from *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1993). Unlike the irrational re-

<sup>6</sup> Respondent asserts that the statutory categories are "vague" and undefined (BIO 4), but fails to specify an particular ambiguity. None is apparent either from the statute itself or the record below. Nor does Respondent dispute that in this facial challenge, the statute must be construed to *avoid* constitutional concerns, not create them. Pet. 4-5 n.1 (citing *Ohio v. Akron Ctr. For Reproductive Health*, 497 U.S. 502, 514 (1990)).



striction on advertising alcohol strength at issue in *Coors Brewing*, Section 6254 represents a reasonable effort to balance competing interests under the First Amendment. The statute fulfills the public's right to know about crime by permitting the general release of the names and physical descriptions of arrestees, as well as the details of the crime. See Section 6254(f)(1). The statute also furthers fundamental First Amendment values by providing addresses to the press, which rarely publishes that information but instead uses it to develop facts for reporting. Section 6254 also furthers individual privacy by withholding the addresses of crime victims and arrestees except for specified, noncommercial purposes. As the Tenth Circuit explained in *Lanphere*, Respondent "would not be involved in this litigation if the information they seek is so widely available that the privacy of the accused is no longer at issue." 21 F.3d 1508, 1514, *cert. denied*, 513 U.S. 1044 (1994).

3. Section 6254 is not an unlawful content-based restriction on commercial speech. The BIO advances the alternative theory, which the Ninth Circuit did not adopt, that Section 6254 is invalid as a "content based" restriction on speech. BIO 11. Wholly apart from whether Section 6254 restricts speech at all (which we addressed above), the statute certainly is not content based. The only line drawn by the statute is between noncommercial uses of arrestee addresses (which are not permitted) and commercial users (some of which are). The statute does not draw *any* distinction based on the recipient's identity. Section 6254 thus prevents *any* person from acquiring address information except for specified noncommercial purposes. As the BIO points out (at 5), the statute applies equally to Respondent and all of its diverse clients: "attorneys, insurance companies, drug and alcohol counselors, religious counselors, driving schools, and others." The distinction drawn by Section 6254 between commercial and noncommercial users is not itself an impermissible content-based restriction because there unquestionably is a substantial difference between Respondent's use of addresses and the press's use of the same information. See *Cincinnati v. Discovery Network*, 507 U.S. 410,

424 (1993) (commercial versus noncommercial distinction is invalid when "the distinction bears no relationship whatsoever to the particular interest that the [government] has asserted").

### **CERTIORARI SHOULD BE GRANTED RATHER THAN HOLDING THIS CASE**

Two other pending petitions, which address the constitutionality of a federal restriction on casino gambling advertisements, relate indirectly to this case. No. 98-741, *United States v. Players Int'l* (before judgment); No. 98-387, *Greater New Orleans Broadcasting Ass'n v. United States*. The courts of appeals disagree over whether exceptions to the gambling advertising scheme render the statute irrational and therefore invalid. Compare *Valley Broadcasting Co. v. United States*, 107 F.3d 1328 (9th Cir.), *cert. denied*, 118 S. Ct. 1050 (1998) (invalid) with *Greater New Orleans Broadcasting Ass'n v. United States*, 149 F.3d 334 (5th Cir. 1998) (valid). The Ninth Circuit in this case invoked its *Valley Broadcasting* decision in holding that Section 6254 is irrational and invalid. Pet. 11-12; Pet. App. 35a.

We assume that the Court will grant certiorari to decide the gambling cases, but recommend against holding this Petition in the interim. Those cases do not address the First Amendment's application to public records statutes. In particular, the gambling cases will not resolve the conflicts created by either the Tenth Circuit's decision that a restriction on the commercial use of government records requires a relatively loose "fit" between the statute's means and ends or the South Carolina Supreme Court's decision that such restrictions do not implicate the First Amendment at all. *Lanphere*, 21 F.3d at 1515; *Walker*, 466 S.E.2d at 348. Moreover, because the gambling cases raise fact-specific challenges, it is unlikely that the Court will reformulate its recent analysis in *Rubin v. Coors Brewing Co.*, 514 U.S. 476, in a way that substantially alters the Ninth Circuit's view of Section 6254. See Pet. for Cert., No. 98-741, *United States v. Players Int'l* (arguing in favor of certiorari before judgment in case with fully developed factual

record). Finally, the large number of state and federal public records statutes directly affected by the division in the lower courts (Pet. App. 1a-5a) counsels in favor of resolving this case directly rather than holding it possibly to remand for further consideration in light of the gambling cases. To the extent that this Petition relates to the gambling cases, we recommend arguing them contemporaneously.

### CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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January 6, 1999

4

Supreme Court, U.S.

FILED

MAR 15 1999

OFFICE OF THE CLERK

No. 98-678

IN THE  
Supreme Court of the United States  
October Term, 1998

Los Angeles Police Department,  
*Petitioner,*

v.

United Reporting Publishing Corp.,  
*Respondent.*

On Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

**JOINT APPENDIX**

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PETITION FOR CERTIORARI FILED OCTOBER 23, 1998  
PETITION FOR CERTIORARI GRANTED JANUARY 25, 1999

SPP -  
f.d.



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**RELEVANT DOCKET ENTRIES**

- 11/27/96 District Court Opinion and Order granting summary judgment to Respondent and permanently enjoining Cal. Gov't Code 6254(f)(3) – reprinted in Petition for Certiorari at App. 10a-23a
- 6/25/98 Court of Appeals Opinion Affirming Order of summary judgment in favor of Respondent – reprinted in Petition for Certiorari at App. 24a-36a

# The "JailMail" Register

May 9, 1996

## Illegal Speed Traps...

by Richard Duquette, Esq.

The Police can't use speed traps when citing a person for speeding (CVC22350), while using radar. The police have the burden of proving as a part of the prima facia case at trial that a certified engineering survey justified the posted speed limit on the local road. (I.E. 85% of the flow of traffic.) If they can't, they lose. Obtain a copy of the survey at the engineers office in the city in which the road is located.

If the police fail to bring a competent certified survey, they often fall back on their personal observations of speed due to training and experience. They claim they made a visual estimate that you were in violation. Object, because under CVC 40804 the officer is not competent to testify and the court has no jurisdiction to convict.

Make objections when evidence is being shown to the judge or introduced by testimony. For a good review of speed trap law, see one of the newest cases in this area; People vs. Earnest (1995) 40 Cal Rptr. 2d 304.



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## SB1059, And our trusted Government Servants?

by Chris Thompson, Editor

What is SB1059? When does it take effect? Who supports SB1059? What is the reasoning behind SB1059? What is the impact of SB1059? These are just a few of the questions on everybody's mind.

Let's start with, exactly what is SB1059? SB1059 is Senate Bill 1059, a bill introduced to the legislature and senate by Senator Peace from San Diego County. The bill was approved by Governor Wilson on October 11, 1995 and filed with the Secretary of State on October 12, 1995. It becomes effective on July 1, 1996.

A government entity sponsored the bill because of a perceived need. Who has "the need" and what is the very nature of the need? This is another good question which deserves an answer. Government by its very definition is a body of individuals which can collectively control and protect individuals and their rights that cannot be protected by the individuals themselves.

Senate Bill 1059 is an act which affects government code 6254, the California Public Records Act: Disclosure of Information. The bill is aimed at restricting access to public law enforcement records in the name of public good. Our California governing body has decided that by restricting access to the "general public" and only allowing individuals with a "scholarly, journalistic, political, or governmental purpose" access to the records, it is protecting us! What are they protecting us from? The debate on the floor of our legislature and senate discussed the merits of the bill. This debate consisted of the undue fiscal burden of allowing the general public access to the records of our public agencies. The Supreme Court has never used money as a sole reason to uphold the right or constitutionality of a piece of legislation.

Currently, the information is being used by a large number of professional and commercial concerns. Newspapers use these records for seed material for feature articles. Law firms offer their services to potential clients. Other businesses with publishing concerns, such as this one, rely on public

Continued on column one, Next page....



# The "JailMail" Register

May 9, 1996

records for their very livelihood. If the bill is truly serving an altruistic purpose and has such lofty goals as protecting the public, then please reveal the horrible monster that is lurking in the shadows ready to get us and let's deal with the monster. But let's not continue to support hasty decisions and bad law solely because it purports to protect us from an unnamed, vague monster which has yet to be seen or identified. Access to public information is a protected right.

If the information is not available publicly then the commercial concerns which rely on the information will no longer be able to survive. They will cease to be a part of our economy. They will no longer be economically viable. These businesses currently conservatively affect over 750 jobs statewide. Let's talk about the good of the public. Eliminate 750 jobs and then interview all the workers displaced by the elimination of their job. Talk to them in the lines at the Employment Development Department, while they are waiting to collect unemployment benefits. Solicit their opinions while they wait in lines to collect welfare benefits. Ask them why they are using food stamps to pay for their groceries. Question them as to why they are not working and if they really feel protected by our state government and their legislative attempts to restrict access to public information.

Businesses collect names, statistics and demographics to offer the information to law firms, insurance agencies, clergy, safety device vendors and substance abuse treatment facilities and other businesses for use in their marketing mix as a potential clientele base. The companies which use this information offer useful information to their prospective clients. They believe in responsible advertising. Some of these businesses, namely attorneys, also adhere to a strict set of guidelines set down by their governing body.

The set of people's names currently provided

by the various agencies comprise a whole subset of our population. The set of individuals currently defined by the public's access to information made available by the law enforcement agencies represent a segment of the population with special needs. This set of individuals becomes a target audience for a whole host of products and services. The business that provide these products and services currently offer these people information about the wealth of options available to them. The simple fact that the names are available to commercial sources allow individuals to benefit from lower costs in legal representation. These same people are made aware of options in treating chemical dependencies and the disease of alcoholism. They are given important information regarding the safeguarding of their constitutional rights. They are educated about an unlimited variety of products and services available to them as it applies to their current life situation and as potential consumers. The marketing by commercial entities allows the potential consumers to "shop price" for the various services they may need. They are offered contextual information which can benefit them in their particular situation and possibly help preserve their rights.

The sole purpose of Senate Bill 1059 is to restrict access to the names and addresses of individuals charged with infractions to our judicial system. What can the bill possibly protect us from? Who is out to get us? Is it the potential suppliers of useful products and services that the public needs protection from? Senate Bill 1059 is designed to categorically deny whole segments of the population access to public information for no real apparent purpose.

Government that is allowed to institute law, mandates, and regulations unchecked, turns quickly into a dictatorship! At what point do we say, "THIS IS NOT RIGHT!" and do something about instituting changes by participating in the process?

000196

# The "JailMail" Register

May 9, 1996

## FIELD SOBRIETY TESTS:

### A STACKED DECK

by Hank Rupp, Esq.

Many persons who are arrested for drunk driving are often amazed because they felt they passed the field sobriety tests. What they don't realize is that these tests are less of an exam than they are an evidence gathering exercise.

Once a police officer has stopped a vehicle and determined that the driver may have drunk alcohol, the officer must investigate further or face potential civil liability. "Let's face it....", says one law enforcement source, (who must remain anonymous for obvious reasons), "...If I cut some guy slack after I know he's been drinking, let him go and then he goes a couple blocks down and mows down a crosswalk full of school kids, whose butt is going to be in a sling along with his? One guess - me."

After an officer is put on notice of a driver's drinking, he is putting his neck in a noose of civil liability if he lets the driver go. He is putting a lot on the line to be a nice guy to a man or woman driver he doesn't even know. He could be fired or sued or both if an accident were to occur afterward.

Stories used to circulate about how a sympathetic officer would sometimes even drive a suspected

drunk driver home. Those stories became rare after other stories came out about those same people suing the officer when they tripped over their own lawn sprinkler or doorstep and broke a leg.

Any civil lawyer worth his salt would be guilty of malpractice if he didn't also sue the officer who let the drinking driver drive on to hit his client. A law enforcement agency can always be counted on to have deep pockets to pay settlements.

Historically, field sobriety tests are a throw back to the time when at trial the state had to prove a driver was impaired. Nowadays the state often just depends on chemical tests to prove a driver's blood alcohol level was beyond the legal limit. When these tests are shown to be unreliable, the prosecution will often revert back to field sobriety tests to show impairment.

The tests are not objective. Many sober persons cannot do them. Add that factor into traffic speeding by, nervousness of the driver and a not too objective officer to get a 99.99% chance of being taken in.

It does happen though. One driver was left standing by a road by officers who told his wife to drive him home after the officers received an urgent distress call, "I guess I was lucky," the driver said. Little does he know how lucky.

## A Letter from the Editor

Having been the editor of several different publications in the past, I realize the importance of a timely publication.

For our publication to be a success, regular articles are needed for publication. Have you ever wished you had the ability to be heard across the state. Do you have something which could be considered newsworthy to the legal community? Here is your chance to become a published author.

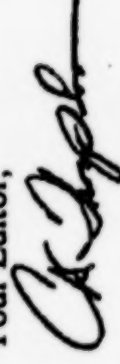
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Your Editor,



Chris Thompson



# The "JailMail" Register

May 9, 1996

## Representative Blotter of charges you are currently interested about!

These names are also available by utilizing our dial up service. For more information about this service contact our subscriptions department at (916) 638-8732.

### NAME FORMAT

Title, First name, Last name  
Address  
City, State, Zipcode  
Code Section, Date of violation

Ms. Pauleen Passakelli  
916 Dornajo Way  
Sacramento, CA 95825-7549  
11377 05/06/1996

Ms. Penny Watley  
3532 Y St Apt 8  
Sacramento, CA 95817-2042  
647 05/06/1996

Mr. William Cleveland  
3216 Laurelhurst Dr  
Rancho Cordova, CA 95670-5815  
23152 05/06/1996

Mr. Clarence Dekoning  
8937 Aksarben Dr  
Orangevale, CA 95662-4609  
23152 05/06/1996

Mr. Billy Penner Jr.  
8250 Florin Rd  
Sacramento, CA 95828-2412  
273.5 05/06/1996

Ms. Betty Baker  
2750 Grove Ave  
Sacramento, CA 95815-1630  
647 05/06/1996

Mr. Wayne Benson  
3820 Haywood St  
Sacramento, CA 95838-3520  
23152 05/06/1996

Mr. Sean Porter  
3905 44th Ave Apt 2  
Sacramento, CA 95824-3538  
647 05/06/1996

Ms. Elizabeth Daniels  
6709 Pradera Mesa Dr  
Sacramento, CA 95824-4229  
11351 05/06/1996

Mr. Robert Coles  
9161 Madison Ave Apt 46  
Orangevale, CA 95662-5275  
459 05/06/1996

Mr. Anthony Delong  
2257 Hurley Way Apt 126  
Sacramento, CA 95825-2353  
273.5 05/06/1996

Mr. Jeffrey Gritten  
4921 36th Ave  
Sacramento, CA 95824-1503  
10851 05/06/1996

Mr. Paubio Ramires  
1380 Tumbleweed Way  
Sacramento, CA 95834-1401  
23152 05/06/1996

Mr. Salvador Lopez  
6601 Sunnyslope Dr Apt 41  
Sacramento, CA 95828-2834  
10851 05/06/1996

Ms. Alisa Smith  
604 Morrison Ave  
Sacramento, CA 95838-3342  
11377 05/06/1996

Ms. Orlinda Green  
2064 68th Ave  
Sacramento, CA 95822-4813  
459 05/06/1996

Ms. Lisa Hypes  
12801 Fair Oaks Blvd Apt 484  
Citrus Heights, CA 95610-5186  
647 05/06/1996

Ms. Tracy Sawyer  
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11357 05/06/1996

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273.5 05/06/1996

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23152 05/06/1996

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23152 05/06/1996

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23152 05/06/1996

Mr. Matthew Nelson  
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Sacramento, CA 95821-5331  
647 05/06/1996

Mr. Long Saechao  
4441 Perry Ave  
Sacramento, CA 95820-5150  
23152 05/06/1996

Mr. Harvey Johns  
3900 Annadale Ln Apt 45  
Sacramento, CA 95821-2030  
273.5 05/06/1996

Ms. Salena Watson  
3532 43rd St  
Sacramento, CA 95817-3732  
23153 05/06/1996

Great care and effort has been expended to accurately reproduce these names from actual law enforcement records. The following list of names represents a partial list of names from actual arrest records gathered from various agencies. These are names of people charged with a judicial code violation and do not represent guilt until proven guilty in a court of law.

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# The "JailMail" Register

June 1, 1998

## Drunk Driving Defense and Malpractice!

by Myles L. Berman, Esq.

Representing a person accused of driving under the influence (DUI) in the State of California requires a high degree of skill, knowledge and experience in criminal law in general and DUI defense in particular. DUI charges are fast becoming the number one criminal charge filed against people arrested in the State of California. Even for a first DUI offense, the penalties are so substantial, one could argue that an attorney who does not have the skill, knowledge or experience in this field would be committing malpractice by choosing to represent someone charged with driving under the influence.

Volumes of legal treatises and scores of seminars have been devoted exclusively to representing persons charged with driving under the influence. A cursory review of the voluminous materials in this field as well as the experience of this author leads one to the compelling conclusion that most driving under the influence cases can be "successfully defended". Successfully defended is defined as a dismissal, acquittal and/or a reduction of DUI charges.

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With every DUI arrest there are two individual cases. The first is the criminal case, and the second is the Department of Motor Vehicle Administrative Per Se suspension/revocation. The criminal charges are governed by criminal law. The DMV administration per se suspension/revocation are governed by administrative and civil law.

With respect to the criminal charges, there are serious constitutional implications that are present in every DUI case. A DUI defense attorney must have in his or her command the most current law in the areas of fourth, fifth and sixth amendments to the U.S. Constitution as well as the rules of evidence and criminal trial procedure. Furthermore, new cases are being decided every day from the U.S. Supreme Court all the way down to State Appellate Courts throughout the country. The California Supreme Court and the Appellate Courts in this State are routinely deciding issues that are placed before it in the field of driving under the influence.

Mastering the vast body of law that permeates this field is still not enough to be competent to defend a person accused of driving under the influence. Being experienced in trying criminal jury trials in general and DUI jury trials in particular is a must for any attorney to be minimally qualified and competent to represent a client accused of DUI. A good DUI defense attorney knows how to neutralize the arresting officer's testimony as well as attack the testimony of the state's experts in connection with blood, breath or urine testing.

Since California allows a choice of a blood, breath or urine test for a suspect arrested for driving under the influence, every DUI defense attorney must have sufficient scientific knowledge in order to effectively cross-examine the state's expert, as well as present defense expert testimony. Chemistry, absorption, peak and elimination of alcohol, mouth alcohol, interfering substances and other scientific issues are extremely critical in representing a person accused of driving under the influence.

Knowledge of the various blood, breath and urine testing methods and their scientific principles is also required for the competent DUI defense attorney. Each chemical testing device has its own unique strengths and weaknesses. It is those weaknesses that must be explored in front of a jury in order to provide a DUI client with effective assistance of counsel. Oftentimes, the state's chemical testing machines are neither calibrated nor operated properly. In addition, unique individual characteristics of a DUI defendant could make any chemical test result scientifically unreliable in a prosecution for driving under the influence.

*Continued on column one, Next page....*

# The "JailMail" Register

June 1, 1996

*Continued from front page.....*

Title 17 of the Code of Regulations of the Health and Safety Code of the State of California governs blood, breath and urine testing in the State of California. A competent DUI defense attorney must have Title 17 mastered. Any deviation from Title 17 in connection with blood, breath or urine testing could result in scientifically unreliable chemical test results. Title 17 is complicated and requires scientific understanding as to chemical testing. Title 17 is applicable in every case where there is a blood, breath or urine test.

I have heard it expressed over and over again by knowledgeable attorneys, prosecutors and judges that driving under the influence cases are more complicated than homicide cases. There are police officers, experts and civilian witnesses in almost every DUI case. Knowing how to effectively examine these types of witnesses requires a great degree of skill, knowledge and experience.

With respect to the Administrative Per Se suspension/revocation, the DUI defense attorney must have a clear understanding as to Rules of Evidence and Procedure with respect to Administrative and Civil Law. The DMV Hearing Officers act as both the Prosecutor and Judge during the Administrative Per Se proceeding. Knowing the Rules of Evidence in raising the proper and timely objections is also necessary to be a competent DUI defense attorney.

Should the Administrative Per Se Hearing not be successful, the DUI defense attorney must take the appropriate steps to perfect and request administrative review. Many times it is during this administrative review process that the DUI defense attorney is successfully able to have the DMV suspension/revocation set aside.

In addition to the administrative review remedy, a DUI defense attorney must know how to proceed by way of writ against the DMV in the local Superior Court. DMV writs are extremely complicated and expensive. Knowing how to properly perfect and file the writ as well as brief and argue the same is essential for a competent DUI attorney.

California State Bar Rule 3-110 sets forth the minimum standards for attorney competency

which is applicable to every attorney who represents a DUI client.

In this author's opinion, a competent and ethical DUI defense attorney must possess a high degree of skill in order to competently represent a client charged with driving under the influence. Unfortunately, many attorneys who represent a person accused of driving under the influence do not possess the skill, knowledge or experience to competently and effectively represent a person accused of DUI. It is incumbent upon any attorney who is considering representing a person accused of driving under the influence to assess his or her own ability to competently and ethically represent the DUI client. If the attorney feels that he or she does not have the required skill, knowledge or experience to take on a DUI client, that attorney must either associate or consult with a competent DUI defense attorney or refer the client to an attorney who has developed the requisite skill, knowledge and experience. Anything less should be considered malpractice and unethical!

\* \* \*

*Editor's Note: The original article also contained the excerpt of professional conduct contained in California State Bar Rule 3-110.*

## How to Reconstruct a Crash... and protect your injury rights!

by Richard Duquette, Esq.

*Editor's Note: This is the first part of a two part series. Look for the second part in the next edition.*

When a crash occurs, the little things win or lose an injury case.

An expert accident reconstructionist looks for the length of skid marks, gouge marks, broken glass, paint transfers, damage to vehicles and more.

Skid Marks prove the speed of the vehicles. There is a scientific speed from skid formula that is used by the experts. By measuring the length and type of skids, speed can be estimated.

Gouge Marks and broken glass help prove the initial point of impact. This shows where the vehicles were when



# The "JailMail" Register

June 1, 1996

*Continued from page 2 column 2...*

they crashed. Knowing the point of impact proves *Vehicle Code violations like Illegal Turns and Right of Way violations* which can win your case by proving liability.

In the next issue look for tips about paint transfers and expert witnesses!

## **Blood, Breath or Urine, Which Test is Most Easy to Defend?**

by Hank Rupp, Esq.

California law currently provides a total of three types of tests for persons charged with drunk driving to take. These choices are blood, breath or urine.

The Police always push the breath test on the suspected drunk driver. The usual explanation is that if the driver tests below .08% he can still be arrested for violation of California Vehicle Code section 23152(a), driving under the influence. That violation does not require the driver to test at .08% or above.

The breath test is not easily attacked later in court. No sample for retesting is preserved and even the machine's calibration - maintenance records are subject to "amendment" and "interpretation" by the State's criminalist who is supposed to maintain them.

The blood test is better but not the best. It can be retested and often the result is not properly certified by State lab technicians. This means a good attorney can keep the results of the testing out of Department of Motor Vehicles hearings. A retest of a blood sample can often result in a reduction of the blood alcohol level by a .01%.

This can be a real help in the companion criminal case.

The best test to take is the urine test because it is the most mistake ridden of them all. A suspect has to completely void his bladder twenty minutes prior to giving a second sample, which will then become the tested sample. A person's body tends to pool alcohol in the bladder. That means testing the initial sample of void would give a much higher blood alcohol reading than what is actually coursing through the person's body at the time. A sample taken twenty minutes after the first void will tend to be more accurate, supposedly, and that is why that is the sample actually tested.

DUI suspects who choose urine are often told by police that if they cannot urinate again twenty minutes after the initial void, it will be counted as a refusal to test. The suspects are told this will make it go much harder for them at the DMV and court (that much is true). Unfortunately, many persons tend to hold back some urine in their bladder so that they can be sure to give another sample later. This conduct completely destroys the accuracy of the test and is rarely known unless spotted by a good attorney during the initial interview. Sometimes the person is completely unaware that they hold back some urine because they are nervous or perhaps have some physical impairment (common in men over 40) that prevents them from completely emptying their bladder.

Therefore, if you took a breath test when you were arrested, it was probably because you were pushed into taking it by the arresting officer. There better non be a "next time" for you but you can let your friends and relatives know that there are three kinds of tests to take: urine, urine and urine.

## **A Letter from the Editor**

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For our publication to be a success, regular articles are needed for publication. Have you ever wished you had the ability to be heard across the state. Do you have something which could be considered newsworthy to the legal community? Here is your chance to become a published author. The hopes of this publication is to be a vital source of information for you and our other subscribers. If you have something you consider to be a potential article for the JailMail Register, please fax or send a copy of your work to:

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Rancho Cordova, California  
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Your Editor,



Chris Thompson



# The "JailMail" Register

June 1, 1996

## Representative Blotter of charges of people charged with a code violation.

Names you are currently interested in are available by utilizing our dial up service. For more information about this service contact Chris at (916) 638-8732.

### NAME FORMAT

Title, First name, Last name  
Address  
City, State, Zipcode  
Code Section, Date of violation

Mr. Benny Jackson 6564 Fountain Ln North Highlands, CA 95660 261 05/30/1996	Mr. Avis Moore 716 Broadway Sacramento, CA 95818-2005 11350 05/30/1996
Mr. Willie Fagalnifin 6116 Ogden Nash Way Sacramento, CA 95842-2739 459 05/30/1996	Mr. Sylvester Kulaga 6445 Feliciter Way Citrus Heights, CA 95610-5001 11377 05/30/1996
Mr. Craig Clark 6679 Cougar Dr Sacramento, CA 95828-1451 211 05/30/1996	Mr. George Frenn 1503 Fulton Ave Apt 40 Sacramento, CA 95825-5133 11368 05/30/1996
Mr. Hunter Gray 10247 Mills Station Rd # 22 Rancho Cordova, CA 95670 459 05/30/1996	Mr. Bennie Bozeman 2801 Conbar Ct Sacramento, CA 95826-3103 211 05/30/1996
Mr. Albert Fernandez 3813 Pinell St Sacramento, CA 95838-3932 11378 05/30/1996	Ms. Sherry Creason 4128 Cabinet Cir North Highlands, CA 95660-5014 496 05/30/1996
Ms. Tammy Bardwell 3813 Pinell St Sacramento, CA 95838-3932 11378 05/30/1996	Mr. Alexander Zolotov 5805 Dotmar Way North Highlands, CA 95660-4711 23152 05/30/1996
Mr. Maurice Vasquez 5952 N Haven Dr North Highlands, CA 95660 273.5 05/30/1996	
Mr. James Austin 7901 Elsie Ave Sacramento, CA 95828-4812 647 05/30/1996	
Mr. Reginald Hutchinson 549 U St # 16 Sacramento CA 95818 459 05/30/1996	
Mr. James Farley 4460 Lemon Hill Ave Sacramento, CA 95824-2951 459 05/30/1996	
Mr. Gerald Ashford 7801 Serrano Ct. Citrus Heights, CA 95621-1034 459 05/30/1996	
Mr. David Channell 7542 Garden Gate Dr Citrus Heights, CA 95621-1910 23152 05/30/1996	
Mr. Aaron Stone 5008 Valley Hi Dr Sacramento, CA 95823-5157 647 05/30/1996	

Great care and effort has been expended to accurately reproduce these names from actual law enforcement records. The following list of names represents a partial list of names from actual arrest records gathered from various agencies. These are names of people charged with a judicial code violation and do not represent guilt until proven guilty in a court of law.

Subscribers of this information assume the risk that the information is accurate and assumes the risk in the use of the information and fully agrees to indemnify the publisher and its agents for any action or inaction by subscribers in receipt of this publication.

**SENATE RULES COMMITTEE**

Office of Senate Floor Analyses

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Fax: (916) 327-4478

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**THIRD READING**

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Bill No: SB 1059  
Author: Peace (D)  
Amended: 3/29/95  
Vote: 21

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SENATE GOVERNMENTAL ORG. COMMITTEE: 11-0,  
4/18/95

AYES: Alquist, Beverly, Greene, Haynes, Hughes, Lewis,  
Meilo, Rosenthal, Thompson, Maddy, Dills

SENATE APPROPRIATIONS COMMITTEE: Senate Rule  
28.8

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**SUBJECT**: Public Records Act: disclosure

**SOURCE**: California Peace Officers Association

---

**DIGEST**: This bill deletes the requirement that state and local law enforcement agencies make public the current address of individuals arrested by these agencies, or victims or witnesses of crimes or incidents, as specified.

**ANALYSIS**: Under current law, the California Public Records Act requires state and local law enforcement

agencies to make public the current address of every individual arrested by the agency, and every victim of or witness to, a crime or incident reported to the agency with certain specified exceptions.

**FISCAL EFFECT:** Appropriation: No      Fiscal Com.:  
Yes      Local No

**SUPPORT:** (Verified 5/10/95)

California Peace Officers Association (source)

**OPPOSITION:** (Verified 5/10/95[])

California Newspaper Publishers Association

**ARGUMENTS IN SUPPORT:** The sponsor of the measure, the California Peace Officers Association, reports that over the past several years there has been a growing number of groups and individuals making "boilerplate" requests under the Public Records Act (PRA) (Government Code Section 6250 et seq) to virtually every law enforcement agency in the State. These requests seek the names and addresses of arrestees, parties to traffic collisions, and others who might have had the misfortune to come into less than desirable contact with law enforcement.

While the requesting party will rarely state the purpose for the information sought, subsequent inquiries have confirmed that in virtually every case, the purpose is to seek to profit from the misfortune of the person being identified. When supplied, the identity and address of the individual is then sold to attorneys, doctors, chiropractors, and others who will inundate the individual with solicitations for services. The processing of these requests has become very costly to agencies with diminishing budget dollars.

The sponsor points out that under this measure, the public's "right to know" would remain intact. The name, charge, circumstances, and other information about arrests and other incidents would still be public information unless otherwise exempted. Only the address of the involved purpose would no longer be available.

**ARGUMENTS IN OPPOSITION:** The opponent states, "Existing law, Government Code Section 6254(f), gives law enforcement agencies the discretion to withhold any information, including the names and addresses of victims and witnesses if they believe that release of the information would impede the successful completion of the investigation or a related investigation or place someone in danger. SB 1059 would foreclose almost all opportunity of access to important information. For example, denying the public access [to] the addresses of all burglaries would prohibit the community from taking appropriate safeguards in an area hard hit by crime.["]

"Because law enforcement already has authority to withhold the information in question, SB 1059 is unnecessary and unreasonably interferes with the public's ability to access information about crime in its communities."

DLW:sl 5/10/95

Senate Floor Analyses

\* \* \* END \* \* \*



5  
No. 98-678

Supreme Court, U.S.

FILED

APR 30 1999

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IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1998

Los Angeles Police Department,  
*Petitioner,*

v.

United Reporting Publishing Corp.,  
*Respondent.*

On Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

**BRIEF FOR THE PETITIONER**

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April 30, 1999

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5488

**QUESTION PRESENTED**

Whether the government violates the First Amendment when it releases records only for limited, noncommercial purposes?

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## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The district court's opinion is published at 946 F. Supp. 822. The Ninth Circuit's opinion is published at 146 F.3d 1133.

### JURISDICTION

The Ninth Circuit entered its judgment on June 25, 1998. This Court granted certiorari on January 25, 1999. Petitioner invokes the jurisdiction of this Court under 28 USC 1254(1).<sup>1</sup>

### STATUTORY PROVISION INVOLVED

The First Amendment to the U.S. Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The statute relevant to this Petition, Cal. Gov't Code § 6254(f)(3) (Deering 1997) is reprinted in full in the Appendix to this Brief, but is reproduced here in relevant part:

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<sup>1</sup> Pursuant to S. Ct. R. 14(e)(v), Petitioner notes that, because this action calls into question the constitutionality of a state statute, 28 USC 2403(b) may apply. In compliance with S. Ct. R. 29.4(c), Petitioner served the Petition for a Writ of Certiorari upon the State of California. Although the Ninth Circuit did not certify to the State Attorney General the fact that the constitutionality of a state statute was drawn into question (*see* S. Ct. R. 29.4(c)), the State Attorney General (i) was a party to the district court proceedings, (ii) is subject to the injunction entered by the district court, and (iii) declined to appeal the district court's ruling to the Ninth Circuit.



[S]tate and local law enforcement agencies shall make public the following information . . . .

(3) [T]he current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator . . . , except that the address of the victim of [certain specified crimes] shall remain confidential. Address information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury.

#### STATEMENT

1. The California Public Records Act, like the federal Freedom of Information Act and the public records statutes of essentially every state, provides that certain government records will be made public, that other records will be kept confidential, and that still others will be released only on certain conditions. Such statutes seek to strike a balance between the state's competing interests in, among other things, fostering an informed public and maintaining individual privacy. Among the records encompassed by these statutes are crime reports. These government records contain a variety of information that the state compels arrestees, victims, and witnesses to provide, including names, addresses, and details about the crime.

Prior to 1996, California provided for the public release of this crime report information. *See* Cal. Gov. Code § 6254 (pre-amendment). The statute, however, gave rise to substantial invasions of individual privacy as persons and businesses used the address information to solicit arrestees,

crime victims, and their families. In particular, a cottage industry of businesses arose demanding that government agencies produce such information for private gain. These businesses (including Respondent United Reporting Publishing Corp.) exist for the almost singular purpose of collecting names, addresses, and other information for their own commercial benefit. The customers of these businesses – principally other businesses such as law firms, chiropractors, and driving schools – use the information to contact and generally to sell their services to arrestees and crime victims.

In response to these invasions of privacy, various groups including the California Peace Officers' Association ("CPOA") proposed in 1995 that the state public records act be amended in order to prohibit the release of crime victim and arrestee addresses. In its legislative proposal, CPOA noted the dramatic growth in the "number of groups and individuals serving boilerplate requests under the Public Records Act to virtually every law enforcement agency in the state." Ct. App. Supp. Excerpt. Rec. 307. In particular, within the previous year alone, the number of requests seeking "the names and addresses of arrestees, parties to traffic collisions and others who might have come in contact with law enforcement" had "increased by 1200%." *Id.* (emphasis added). CPOA therefore proposed "simply deleting the two words 'current address'" from the statutory sections providing for the release of crime report information. *Id.*

A variety of groups and individuals offered their strong support for the proposal. For example, the San Diego County Sheriff's Department noted its experience that, "[m]ore often than not, the information sought in these requests has nothing to do with the underlying purpose of providing access to public records." Ct. App. Supp. Excerpt. Rec. 307. Instead, "persons [who] have been arrested become the target of lawyer solicitations; burglary victims become the target of alarm companies; battery victims become the target of chiropractor solicitations; etc." *Id.* The state Attorney

General's Office submitted its view that "[s]uch practices jeopardize the privacy, dignity, and even the security, of these persons." *Id.* 339. And other organizations noted the "countless complaints from crime victims and other injured parties about unsolicited business offers that followed their victimization and suffering." *Id.* 366.

Attorneys also voiced their support for reforming the statute as well. They noted, for example, that "[i]t is not uncommon to have more than a dozen letters received by the same individual, or his mother, father or spouse. Such letters, received by a person other than the arrestee himself, can result in significant embarrassment, loss of employment, even marital divorce." Ct. App. Supp. Excerpt. Rec. 364. Others catalogued the experience of their clients with "the additional trauma caused by receiving numerous letters (sometimes in excess of sixteen) from attorneys who are aware of that person's arrest and who are soliciting that person's business" (*id.* 334) and recorded their view that the "[g]overnment should not be the partner to this shabby business" (*id.* 361).

Support for CPOA's proposal was far from uniform, however, and various constituencies objected that crime victim and arrestee addresses should not be withheld *entirely*. These concerns led, for example, to amendments relating to the use of address information by licensed investigators. Ct. App. Supp. Excerpt. Rec. 263, 269, 358. Separately, the California Newspapers Association voiced its opposition on the ground that the amendment "would foreclose almost all opportunity of access to important information." *Id.* 329. The California First Amendment Coalition emphatically contended that "surely there is a more carefully tailored remedy," given that:

With respect to both arrestees and victims, address information is moreover essential if the press is to have any hope of following up – in a timely way – [detecting crime patterns in particular areas], or even getting crime-related information which is

increasingly hard to come by from law enforcement agencies directly.

Address specifics are likewise typically the only way that the press can avoid confusing the identities of people with common names in crime reports. . . . While newspapers seldom print exact addresses nowadays, it is not uncommon to localize identities by neighborhood or street ("an Acme Boulevard resident, John A. Jones, was arrested Tuesday in connection with...").

*Id.* 382.

In light of these competing considerations, the Legislature rejected CPOA's proposal that addresses of crime victims and arrestees be withheld entirely. Instead, the state adopted a more tailored amendment. As finally enacted, Section 6254(f)(3) provides that address information will be available "for a scholarly, journalistic, political, or governmental purpose, or . . . for investigation purposes by a licensed private investigator." Furthermore, the requestor must certify that the addresses will "not be used directly or indirectly to sell a product or service."

2. Before the statute's July 1, 1996 effective date, Respondent filed suit in federal district court seeking a declaration that Section 6254(f)(3) violated both the First and Fifteenth Amendments and also an injunction against its enforcement. Ct. App. Rec. 1. Respondent identified itself as "a publishing service that provides, among other information, the names and addresses of recently arrested individuals to its clients," which include "attorneys, insurance companies, drug and alcohol counselors, religious counselors, driving schools, and services such as ignition Breathalyzers." *Id.* 5, ¶ 19. So far as the complaint revealed, Respondent itself used address information to communicate only when it distributed the



"Register," which Respondent described as a publication protected by the First Amendment. *Id.* 8, ¶ 5.<sup>2</sup>

After various pre-trial proceedings, the district court granted Respondent summary judgment on its claim that Section 6254 constituted "an unconstitutional limitation on [Respondent's] commercial speech" and therefore permanently enjoined enforcement of the statute. Pet. App. 12a. The district court acknowledged this Court's repeated admonition that "[t]he First Amendment directly protects the expression of information already obtained; it does not guarantee access to the sources of information" (*id.* 12a-13a), and therefore recognized that "the state could constitutionally prevent everyone from having access to this information" (*id.* 14a.) But the district court nonetheless deemed the statute to "[f]unctionally" constitute "a limitation on commercial speech" because "[t]he government is the only source of this information." *Id.*

The District Court subjected the statute to the full scrutiny applied to commercial speech bans under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Pet. App. 16a. Under *Central Hudson*,

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<sup>2</sup> Although the statute never had gone into effect, Respondent alleged that Section 6254(f)(3) was unconstitutional not only on its face but also as applied. *Id.* 6, ¶ 26. By the time of the district court's decision, the statute had gone into effect and Respondent had refused to provide the required certification that its use of address information, including its publication of the "Register," constituted a "journalistic" or another other permitted purpose. As noted below, the lower courts did not reach Respondent's contention that Section 6254(f)(3) would not permit Respondent to request address information under the statute's journalism provision.

[1] At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. [3] If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest, and [4] whether it is more extensive than is necessary to serve that interest.

447 U.S. at 566, *quoted at* Pet. App. 16a.

In evaluating Section 6254(f)(3), the district court did not acknowledge either that the statute permits the release of information for only limited purposes. Instead, the district court proceeded from the premise that Section 6254(f)(3) "prohibit[s] the release of arrestee addresses *only* to people who intend to use those addresses for commercial purposes." *Id.* 11a (emphasis added); *see also, e.g., id.* 14a (Section 6254(f)(3) "makes all arrestee information public, but then limits access only to those who plan to use arrestee addresses in commercial speech"). Analyzing the statute under the first two prongs of the *Central Hudson* test, the district court concluded that Respondent's speech concerned a lawful activity and was not misleading, and furthermore that the state's asserted interest in protecting individual privacy was substantial. *Id.* 17a.<sup>3</sup>

The district court concluded that Section 6254(f)(3) was unconstitutional because the statute failed to "directly advance" the state's asserted interest. In particular, "the

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<sup>3</sup> The district court also recognized that the state's interest in reducing the costs of producing voluminous address reports was substantial but concluded that the statute did not advance that interest because the state must compile the same information for noncommercial users. Pet. App. 18a.



statute still allows [an arrestee's] name and address to be published in newspapers, broadcast on television, and/or obtained by an employer or even an enemy." Pet. App. 21a. The district court also invoked affidavits submitted by Respondent from arrestees "stating that they do not feel that the solicitations invaded their privacy and that they found them helpful." *Id.* As for the privacy interests protected by the statute, the district court concluded that, "If [arrestees] don't like the solicitation, they can simply throw it away." *Id.* Based on the identical rationale, the district court held that "there is not a reasonable fit between the legislature's means and ends." *Id.* 22a.<sup>4</sup>

3. On Petitioner's appeal, the Ninth Circuit affirmed. At the outset, the court of appeals rejected Respondent's suggestion that its sale of address information constituted noncommercial speech entitled to full First Amendment protection: Respondent's "speech can be reduced to, 'I [United Reporting] will sell you [client] the X [names and addresses of arrestees] at the Y price.'" Pet. App. 29a (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976)) (alterations in original). But the Ninth Circuit agreed with the district court that Section 6254(f)(3) failed to directly advance a substantial state interest. In particular, the court of appeals accepted the district court's characterization that under Section 6254(f)(3) "anyone may access the records in question so long as they do not do so with an eye towards using the information for certain types of commercial solicitations." Pet. App. 33a. Based on this premise and relying in part on *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), the Ninth Circuit held that the statute's exceptions rendered it unconstitutional stating

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<sup>4</sup> Given this broad holding that Section 6254(f)(3) was unconstitutional, the district court did not reach Respondent's alternative argument that the statute would prohibit its publication of the "Register" and thereby violate the First Amendment.

that "[i]t is not rational for a statute which purports to advance the governmental interest in protecting the privacy of arrestees to allow the names and addresses of the same to be published in any newspaper, article, or magazine in the country so long as the information is not used for commercial purposes." *Id.*

This Court subsequently granted certiorari.

### SUMMARY OF THE ARGUMENT

Cal. Gov't Code § 6254(f)(3) is a constitutional exercise of the state's right to place conditions upon the release of state resources, including conditions that ensure these resources are not commercially exploited. The provision does not regulate speech or penalize the exercise of free speech rights. United Reporting is free to obtain the identical information from other sources and disseminate it freely.

Section 6254(f)(3) is thus no more than an access restriction, and there is no First Amendment right of access to government-controlled information, let alone the home addresses of arrestees and victims of crimes that are only available because of the state's coercive powers. This Court's precedents are emphatic that the Constitution protects the public's right to know by proscribing restrictions on speech and the press, not by guaranteeing a right of access to government information. If there is any tradition governing the release of government information, it is one that leaves the sensitive questions of which records to release and to whom to the democratic process.

Nor does California's release of the home addresses of arrestees and crime victims for a select number of purposes raise First Amendment concerns or merit heightened scrutiny. Section 6254(f)(3) does not deny access to information to any individual or organization based upon the content of their speech or their viewpoint. Instead, any requester can receive the information for the limited number of purposes that the statute authorizes. The lines drawn by the statute are unrelated to speech and instead primarily relate to the state's

interest in ensuring that the public is kept informed about matters related to arrestees and victims.

Because Section 6254(f)(3) is no more than an exercise of the legislature's power to limit access to its resources for purposes it deems to be in the public interest, only minimal scrutiny applies. To the extent that the statute at all restricts Respondent's ability to use address information for commercial speech (and Respondent's speech interest in this case borders on the ethereal), that restriction is incidental to the State's unquestioned right to control the use of its resources. The state legislature may subsidize those activities that it chooses and has no obligation to allow Respondent to make a profit off of state resources simply because it allows the use of those resources for other limited purposes. Further, even though the provision does not even classify authorized uses on the basis of speech, it is entirely within the state's power to subsidize certain types of speech while refusing to subsidize others. In addition to endangering the state's power to control the use of its resources, applying heightened scrutiny to the classification drawn by the California legislature additionally risks undermining the very values that Respondent claims to champion by giving the State an incentive to withhold information entirely if put to a choice between releasing it for no uses and releasing it for all uses.

Section 6254 is an entirely rational means of advancing the state's interest in balancing the state's interest in an informed citizenry with the right of arrestees and victims to privacy. The provision markedly reduces the total dissemination of private arrestee information and consequently reduces the volume of solicitations of arrestees and victims that occur through the use of state information. Further, the statute prevents employers, banks, credit bureaus, and universities among other institutions from discriminating against arrestees. The state may also properly deem trafficking in private information to be a disfavored business

that the state need not support through its coercive power to compel its citizens to provide private information.

Cal. Gov't Code § 6254(f)(3) also meets the requirements of the *Central Hudson* test for restrictions on commercial speech. The statute directly advances the State's competing interests in protecting the privacy of arrestees and victims while keeping the public informed about matters of public significance. It protects privacy by reducing the dissemination of private arrestee information, reducing the solicitation of arrestees, preventing arrestee information from being used against arrestees, and preventing the commercialization of information that is made available due to the coercive powers of the state. Further, the provision reasonably fits the state's interest in balancing the public's right to know against the individual arrestee's interest in privacy by providing address information only for those purposes that best keep the public informed at the lowest possible cost to privacy.

## ARGUMENT

- I. Cal. Gov't Code § 6254(f)(3) is Constitutional Because it Advances the State's Interest in Protecting the Privacy of Arrestees and Victims While Keeping the Public Informed about Matters of Public Significance
  - A. The Ninth Circuit Erred in Evaluating Cal. Gov't Code § 6254(f)(3) Under the *Central Hudson* Framework Because the Provision is not a Speech Restriction

Section 6254(f)(3) does not restrict commercial speech and therefore is not properly subject to scrutiny under the *Central Hudson* framework. First and foremost, the statute does not restrict speech. It does not regulate speech or deny a benefit to any individual or organization because that organization engages in disfavored speech. Nor does it penalize United Reporting for publishing this information if it obtains it from another source. *Smith v. Daily Mail Publ'g*



*Co.*, 443 U.S. 97 (1979). The statute instead authorizes the release of information to anyone who agrees to use it for one of five prescribed purposes.

As a result, Section 6254(f)(3) prevents most uses of the information and thus does not even single out commercial uses for disfavored treatment. It prohibits acquisition of address information not only for commercial purposes but also for charity. A nonprofit group may not use the information to provide counseling to victims or arrestees, just as an attorney may not solicit clients with it. A religious institution may not obtain the list to provide comfort or to increase its membership. Contrary to the reading of the lower courts, the provision also does not allow general public access to the addresses out of idle curiosity, to determine whether a neighbor has ever been arrested, or to locate someone. Similarly, a newspaper may not use the information to solicit newspaper subscriptions, nor could a licensed private investigator use the information to drum up business.

Section 6254(f)(3) also operates prophylactically to prevent many uses of address information that have nothing to do with speech. For example, the statute prevents employers, from using the information to decide whether to hire or fire an applicant or employee. It also prevents the amateur sleuth from obtaining the information to investigate a crime.

Given that the statute does not regulate speech at all, the statute certainly does not regulate speech on the basis of content or viewpoint. Nor does the statute prohibit certain speakers from speaking on certain subjects. See *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). Nor has the government dedicated a forum for speech in general or speech on a particular subject and then discriminated within that forum on the basis of viewpoint. See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). A reporter who wants to use the information to write an article that an arrestee was the victim of police brutality is as free to use arrestee addresses to help write that article as the reporter

who argues that the police showed restraint. A victim's rights group seeking to use address information for the political purpose of inspiring a victim to advocate for greater protection for victim's rights may do so. So too may a defense attorney seeking to enlist an arrestee's help in protesting police brutality.

On the other hand, victim's rights advocates may not obtain victim's addresses simply to provide counseling, just as a criminal defense attorney may not use the information to solicit a client. And no one may exploit the information for a commercial or charitable purpose no matter what the viewpoint or content of the message.<sup>5</sup> Groups ranging from churches to lawyers to insurance companies are prohibited from soliciting using the home addresses of arrestees and victims. The statute is thus wholly unlike the statutes that this Court has previously evaluated under the *Central Hudson* framework, which prohibited certain messages based upon content or viewpoint or involved government-enforced contributions for the dissemination of certain types of messages.<sup>6</sup>

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<sup>5</sup> This Court's decisions evaluating the First Amendment right of attorneys to solicit clients are thus inapposite. See, e.g., *Florida Bar v. Went For It*, 515 U.S. 618 (1995). Most importantly, the regulation of attorney solicitation does not require the same level of justification as the refusal to subsidize attorney solicitation. Further, unlike decisions addressing attorney solicitation and commercial speech generally, the state has not here singled out any particular message or viewpoint for disfavorable treatment. Moreover, the state has not even targeted speech, but instead has merely prevented the use of arrestee addresses for profit among many other uses that the statute does not authorize.

<sup>6</sup> See *Glickman v. Wileman Bros & Elliot, Inc.*, 521 U.S. 457 (1997) (sustaining mandatory assessments on agriculture producers for generic advertising); *44 Liquormart v. Rhode Island*, 517 U.S. 484 (1996) (striking down Rhode Island ban on alcohol



To the extent that a speech interest of Respondent's is at stake in this case, it borders on the ethereal. The Ninth Circuit defined Respondent's speech interest as follows: "United Reporting sells arrestee information to clients; nothing more. Its speech can be reduced to, 'I [United Reporting] will sell you [client] the X [names and addresses of arrestees] at the Y

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advertising); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (striking down prohibition on the display of alcohol content on beer labels); *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993) (upholding federal statutes that prohibit publication of lottery by a broadcaster licensed by a state that prohibits lotteries but permit publication by a broadcaster licensed by a state that authorizes lotteries); *Board of Trustees v. Fox*, 492 U.S. 469 (1989) (rejecting "least" restrictive means test for commercial speech and remanding prohibition on commercial enterprises in university facilities that contained many exceptions); *San Francisco Arts & Athletics v. United States Olympic Committee*, 483 U.S. 522, 526 (1987) (upholding statute authorizing United States Olympic Committee "to prohibit certain commercial and promotional uses of the word 'Olympic'"); *Posadas De Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) (upholding statute restricting advertising of casino gambling in Puerto Rico); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983) (striking down ban on unsolicited ads for contraceptives); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (striking down ban on outdoor advertising billboards); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (holding that the ban on promotional advertising by electric utilities violated the First Amendment); see also *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85 (1977) (striking down ban on "For Sale" and "Sold" signs in township); *Virginia State Bd. Of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748 (1976) (striking down ban on advertisement of prescription drug prices). The Court has also evaluated restrictions on attorney solicitation under the *Central Hudson* test. See, e.g., *Florida Bar v. Went For It*, 515 U.S. 618 (1995) (sustaining Florida Bar's ban on direct mail attorney solicitations of accident victims and relatives for 30 days after the accident); see also *Edenfield v. Fane*, 507 U.S. 761 (1993) (striking down ban on in-person solicitation by CPAs).

price.'" Pet. App. 29a. Even this limited conception overstates Respondent's interest. First, the statute does not prohibit Respondent from stating this message; it simply prohibits Respondent from selling state-collected information and thus only prevents Respondent from making the statement accurate using the state's resources. The provision thus does not prohibit restrictions on truthful speech about lawful products. Compare, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996). To the contrary, it prohibits all commercial exploitation of this state-collected information.

Second, even if there were an effect on Respondent's "message," that effect is at best indirect. The regulation (1) prohibits United Reporting from gathering information (2) so that it then has the information available to sell to its clients (3) so it can then truthfully tell its clients that it can sell them X information at Y price. As this Court recognized in *Zemel v. Rusk* in upholding a ban on travel to Cuba against a First Amendment challenge:

[There] are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.

381 U.S. 1, 16-17 (1965).

Taking into account the speech interest of Respondent's clients in solicitation of arrestees and victims, which Respondents lack standing to assert, does not change the analysis. Section 6254(f)(3) still simply limits the use of the information. It does not regulate solicitation, does not condition a benefit on anyone's agreement not to solicit so

long as they do not use the information itself to solicit, does not classify authorized uses on the basis of speech, and disallows most uses of the information, including all for-profit and charitable uses. All of United Reporting's clients may continue to solicit arrestees and victims but are no longer entitled to the state's help in finding their prospective clients.

The statute thus effects nothing more than the limited release of the private home addresses of arrestees and victims of crime. As explained in the next section, United Reporting and the public in general have no right to this information under this Court's First Amendment precedents. Accordingly, the state's release of the information for limited purposes while proscribing its use for all other purposes is, as Section C will elaborate, no more than an unproblematic exercise of the California legislature's power to control the use of its resources. To justify such a provision, the State need only demonstrate that the provision is rational, a test that Cal. Gov't Code § 6254(f)(3) easily passes. The Ninth Circuit thus erred in applying the *Central Hudson* framework to this provision.

#### B. There is no Constitutional Right of Access to the Home Addresses of Arrestees and Victims

Had the California legislature so desired, it could have eliminated all public access to the addresses of arrestees and victims. Cal. Gov't Code § 6254(f)(3) does not implicate the First Amendment because it simply limits access to information and does not restrict speech. The provision thus fits squarely within this Court's longstanding refusal to recognize a First Amendment right of access to government information. Respondent's claim, if successful, would constitutionalize an area that has historically been the province of the political branches of government.

Restrictions on access to government information do not run afoul of the First Amendment. The Constitution "is neither a Freedom of Information Act nor an Official Secrets

Act." *Houchins v. KQED, Inc.*, 438 U.S. 1, 14 (1978) (plurality opinion). "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." *Id.* at 15. While the right of the public to know about the affairs of government is an important consideration that underlies the First Amendment, the Constitution accomplishes this goal not by requiring the government to release information in the government's possession but by the indirect means of proscribing government regulation of the speech of its citizens and the press.<sup>7</sup>

As Justice Stewart explained:

"The Constitution, in other words, establishes the contest, not its resolution. Congress may provide a resolution at least in some instances, through carefully drawn legislation. For the rest, we must rely, as so often in our system, on the tug and pull of the political forces in American society."

*Houchins*, 438 U.S. at 14 (quoting Justice Stewart (who also concurred in the judgment in *Houchins*); "Or of the Press," 26 Hastings L.J. 631, 636 (1975)). Thus, while the Constitution requires the scrutiny of regulations which ban or regulate the publication of information in the speaker's possession, *see, e.g., Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979) (West Virginia law that prohibited publication of the identity of juvenile offenders without prior court approval was an

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<sup>7</sup> *E.g., Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (civil discovery rules facilitating a litigant's ability to obtain information from the other side were "a matter of legislative grace"; thus, "information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in another context")



unconstitutional prior restraint), it does not require the government to disclose government information to the public.

The lone qualification to the state's ability to limit public access to government proceedings is the presumptive right of the public to attend criminal trials.<sup>8</sup> Respondent seizes upon this right to argue for a general right of access to information. See Resp. C.A. Br. 19, 21-22. In doing so, Respondent ignores both precedent and the very rationale for the Court's decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). *Richmond Newspapers* held that such trials are presumptively public because of the long tradition of public access to such trials, which predated the First and Fourteenth Amendments. The Court rooted this right in the "unbroken, uncontradicted" history of public trials, which dated back to long before the Constitution and as far back as the Norman Conquest. *Id.* at 565, 573.

The Court further recognized that the "Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open," *id.* at 575, and thus that the "right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press." *Id.* at 577.<sup>9</sup> The Court also recognized the connection between

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<sup>8</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and its progeny are the lone cases of this court cited by Respondent for its statement that "The First Amendment and Its California Equivalent Rigorously Protect Access to Information." Resp. C.A. Br. 18. But Respondent ignores the *Houchins* plurality's emphatic rejection of this position as well as the dissent's recognition that the extent of public disclosure of government records is a matter of government policy. See *infra* n.13.

<sup>9</sup> Based on the same rationale, this Court similarly found in *Press-Enterprise Co. v. Superior Ct. of Cal.*, 464 U.S. 501, 508 (1984), that jury selection should be presumptively open based upon the fact that "[p]ublic jury selection . . . was the common practice in

the right of assembly and criminal trials. *Id.* Moreover, the Court expressly distinguished cases that declined to find a similar right of access to prisons because of the lack of a similar historical tradition of openness. *Id.* at 576 n.11.

Suffice it to say that no similar historical pedigree or interest supports a right of access to the home addresses of arrestees and victims. Indeed, this Court has recognized in the context of the Freedom of Information Act that the "public interest in disclosure is at its nadir" when third parties seek law enforcement records concerning private citizens, given that those records would shed no light on the activities of government agencies or officials." *United States Dep't of Defense v. FLRA*, 510 U.S. 487 (1994) (quoting *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 764 (1989)). Further, statutes granting broad public access to government records are a relatively recent innovation that far postdates the ratification of the Constitution or the Fourteenth Amendment. Indeed, by 1940, only twelve states had open records statutes at all and "[e]ven these were usually only one or two sentences in length and lacked any interpretive definitions or guidelines." Comment, "Public Inspection of State and Municipal Documents: 'Everybody, Practically Everything, Anytime, Except . . .'", 45 Fordham L. Rev. 1105, 1107 (1977).

Historically, in the vast majority of states, open records law was judicial in origin and had a very limited scope and purpose. *Id.* at 1107, 1108. "The common law rules regarding public inspection of documents developed largely in response to evidentiary requirements of litigants rather than as

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America when the Constitution was adopted," and in *Press-Enterprise Co. v. Superior Ct. of Cal.*, 478 U.S. 1, 10-11 (1986) that preliminary hearings should be similarly accessible given a similar tradition of presumptive accessibility.



a monitoring process of public servants.” *Id.* at 1108.<sup>10</sup> Slowly, some courts broadened the “litigation interest” requirement but still required those seeking access to be “acting on behalf of a broader public interest,” *id.*, such as, for example, “a citizen’s desire to keep a watchful eye on the workings of public agencies” or “a newspaper publisher’s intention to publish information concerning the operation of government.” *Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 598 (1978) (citing cases). At the same time, some states continued to maintain the litigation interest requirement even into the 1970s. *See, e.g., Daluz v. Hawksley*, 351 A.2d 820, 833 (R.I. 1976).

Gradually, the narrow common law of open records gave way to far broader freedom of information statutes, and by 1977, 48 states had such laws. *See* Comment, 45 Fordham L. Rev. at 1106 (collecting statutes). These statutes tend to grant broad rights of access to a wide array of public documents while imposing various restrictions on the use of particular types of records. Commercial purpose restrictions, such as the one at issue in this case, are common. Six states, for example, either have general commercial purpose restrictions in their open records statutes, *see* Ariz. Rev. Stat. § 39-121.03 (1997); N.Y. Pub. Off. Law § 89 (Consol. 1998); R.I. Gen. Laws § 38-2-6 (1997); Wash. Admin. Code § 42.17.1260 (1997), or limit the commercial use of a broad class of public records, *see* Md. Code Ann. § 9-1015 (1997) (vital records) and N.M. Stat.

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<sup>10</sup> The requester would generally be required to establish an interest in the document, “such as would enable him to maintain or defend an action for which the document or record sought can furnish necessary information.” *Id.* at 1108 (citing *Fayette Co. v. Martin*, 1130 S.W.2d 838, 843 (Ky. 1939)), a decision that was not overruled until 1974 in *City of St. Matthews v. Voice of St. Matthews, Inc.*, 519 S.W.2d 811 (Ky. 1974).

Ann. § 14-2-A-1 (Michie 1998) (databases of state agencies).<sup>11</sup>

Many other states restrict the use of certain types of records for commercial and other purposes. In all, at least thirty-four states and the District of Columbia prevent the commercial exploitation of at least some government records. For example, an additional nine states whose open records statutes lack general commercial purpose exclusions prohibit the commercial *and* political use of welfare records but allow their use for other purposes. *See, e.g.,* O.C.G.A. § 49-4-14(b) (1997) (Georgia statute stating that no person obtaining public assistance records from the government “shall use such information for commercial or political purposes”).

Other states forbid the use of election disclosure reports for commercial purposes or for the purpose of soliciting contributions. *See, e.g.,* Haw. Rev. Stat. § 11-193(a)(4) (1997) (stating that “no information or copies from the reports shall be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose”). Other states, like California, enumerate authorized uses of information and exclude all others. Florida, for example, while specifically prohibiting the use of voter registration information for commercial purposes, forbids the use of a list of registered voters for any use *other than* any “related to elections, political or governmental activities, voter registration, or law enforcement.” Fla. Stat. § 98.095(2) (1997). State statutes also limit, for example, the commercial use of state motor vehicle registration information, *e.g.,* Ark. Code Ann. § 27-14-412 (Michie 1997); accident reports, *e.g.,*

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<sup>11</sup> *See* Pet. 1a-6a for a complete list of state statutes with commercial purpose exclusions. In that appendix, Ky. Rev. Stat. Ann. § 61.870 was inadvertently included in category B (General Public Records Statutes), and S.C. Code Ann. § 30-4-50 should have been included in category F (Miscellaneous Statutes).

Ariz. Rev. Stat. § 28-667 (1998); traffic citations, e.g., Fla. Stat. § 316.650 (1998); information on gross receipts provided in applications for business licenses, S.C. Code Ann. § 30-4-40 (Law Co-op. 1997); public records including the personal information of the handicapped for solicitation solely on the basis of the handicap, *id.*; and information contained in a police incident report as well as the names and addresses of employees and officers revealed in response to a freedom of information request, S.C. Code Ann. § 30-4-50(B) (Law Co-op. 1997).

Analogous federal laws and regulations restrict the use of certain types of records. Indeed, this Court until recently prohibited the use of tapes of its proceedings for commercial purposes.<sup>12</sup> For example, federal law permits public access to reports and statements that must be filed with the FEC, but prohibits any information obtained from these records to be used for commercial purposes. 2 U.S.C. § 438 (1998). Similarly, reports filed pursuant to the Ethics in Government Act may not be used for commercial purposes "other than by news and communications media for dissemination to the general public." 5 U.S.C. § 105(c)(1)(B) (1998). Further, Congress has specifically legislated that states will not be deprived of any grants to which they are entitled under the Social Security Act for granting public access to state disbursement records, so long as the states prohibit the use of the names of payment recipients for commercial or political purposes. 42 U.S.C. § 1306a (1998).

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<sup>12</sup> "For almost 25 years, the oral argument tapes, made by court personnel, were available only to federal employees in connection with their official duties or to people doing 'scholarly or legal research.' Copying of the tapes was limited, and the tapes could not be used for commercial purposes." Joan Biskupic, "Court Makes Tapes of Arguments Available; Easing of Restrictions Follows Dispute over Professor's Sale of Sets," Washington Post, November 2, 1993, at A4.

In addition to restricting access to different types of records for different purposes, states have also adopted various procedures for preventing the unauthorized use of public records. Section 6254(f)(3), for example, penalizes the securing of the information under false pretenses. Other states penalize the actual use of the information for unauthorized purposes. Indiana, for example, penalizes the use of a welfare list for commercial purposes as a Class B misdemeanor. Ind. Code Ann. § 12-14-22-8 (Michie 1998). Georgia punishes the government employee who discloses the information "when the employee knows or reasonably should know that the request for access to the [accident report] is for an unauthorized purpose." O.C.G.A. § 33-24-53(c) (1998).

Thus, if there is a tradition that governs open records laws, it is one of evolution and experimentation governed by a variety of approaches to the myriad issues posed by public access to government records. Driven by democracy, this tradition of openness has resulted in broad public access to public records with exceptions enacted by state legislatures to protect other interests. Respondent would cut a broad swath through this exemplar of responsible self-governance and render it a mere supplement to the Constitution. Every complaint that an information restriction violates the Freedom of Information Act or analogous state law would now contain an additional count entitled "First Amendment," and *United Reporting* litigation would become a subspecialty in the law.<sup>13</sup>

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<sup>13</sup> *United Reporting* litigation is proceeding apace in California. Since the Ninth Circuit's decision, two commercial information providers, one represented by Respondent's counsel, have filed lawsuits challenging two separate provisions of the California code. In *Health Information Association v. Younkin*, No. 99-CV-0046-TW, plaintiff challenges Cal. Lab. Code § 138.7 (b)(5) (Deering 1997), which provides that the addresses of those filing workers' compensation claims may only be released to specified governmental entities or "for journalistic purposes." In *IRSC v. Jones*, No. SACV98-1112LHM, the plaintiff challenges Cal. Gov't



In addition to the lack of a constitutional basis for a general duty to disclose government information, let alone the home addresses of victims and arrestees, the countless difficulties endemic in defining such a right counsel against its recognition. Indeed,

There is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure or access to information. Because the Constitution affords no guidelines, absent statutory standards, hundreds of judges would, under the Court of Appeals' approach, be at large to fashion ad hoc standards, in individual cases, according to their own idea of what seems 'desirable' or 'expedient.'

*Houchins*, 438 U.S. at 14.<sup>14</sup> As a consequence, this Court has long held that it is up to the political branches to weigh the

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Code § 6254.4 (Deering 1997) and Cal. Elec. Code §§ 2194(a)(2) (Deering 1997), 18109 (Deering 1997), which provide that voter registration lists may only be released to candidates, political committees, or for "election, scholarly, journalistic, political, or governmental purposes."

<sup>14</sup> While the Court was divided on the prison regulation in *Houchins*, it was unanimous on the point that the Constitution does not afford a general right of access to government records. The dissent in *Houchins* agreed that the extent of public disclosure of government records should generally be left to the political process and noted that the question of whether the prison's policies, "which cut off the flow of information at its source," violated the public's right to know "does not depend upon the degree of public disclosure which should attend the operation of most government activity. Such matters involve questions of policy which generally must be resolved by the political branches of government." *Id.* at 34 (Stevens, J., dissenting). The dissent went on to observe that prison conditions are "wholly without claim to confidentiality," which is not true of the home addresses of arrestees and crime victims. *Id.* at 36. Further, Section 6254(f)(3) would only "cut off the information

state's interest in an informed citizenry against the need to prevent the dissemination of private information revealed in judicial proceedings. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) ("If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. *Their political institutions* must weigh the interests in privacy with the interests of the public to know and of the press to publish" (emphasis added)). A restriction on access to the home addresses of arrestees and victims of crime provides no basis for deviating from this traditional course and thereby constitutionalizing an area of law that in the past has properly been left to the considered judgment of state courts and legislatures.

- C. Because Cal. Gov't Code § 6254(f)(3) is an Access Restriction that Allows the Release of Information Only for Specified Purposes, Only Rational Basis Scrutiny Applies.

Because the First Amendment grants no right of access to the addresses of arrestees and victims, the lone remaining question is whether the release of the information for certain authorized purposes implicates the First Amendment. It does not. The state is under no obligation to allow the for-profit use of the private information of its citizens.<sup>15</sup> Thus, even though the state did not do so in this case, it would have been entirely constitutional for the California legislature to prevent

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at its source" if it prohibited arrestees from disclosing their own addresses.

<sup>15</sup> Because this case implicates no more than United Reporting's right to sell state-collected private information, it does not present the question of what standard of scrutiny applies to an attempt by the government to regulate the sale of information that is not provided by the state.



all use of the information for a commercial purpose or to prevent its use for commercial solicitation alone.

Any other conclusion would implicate the First Amendment in every corporate subsidy and in every advantage that the government provides to nonprofit organizations over businesses that could help a business to speak. That result is irrational and conflicts with precedent. In *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788 (1985), for example, this Court held that a government charity fundraising drive aimed at federal employees could exclude nonprofit groups that seek to influence elections or public policy through political activity, lobbying, or litigation was reasonable and, therefore, constitutional so long as the restriction was not a pretext for viewpoint discrimination against the plaintiff. Respondent's position would not only mean that *Cornelius* was wrongly decided, but that heightened scrutiny would have applied to the government's decision to exclude for-profit solicitation from the charity drive.

Instead, as *Cornelius* reflects, the law is clear that the government may selectively support speech-related activity so long as it does not "discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas." *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983) (citations and internal quotations omitted). In TWR the Court upheld a provision of the tax code that denied a nonprofit organization the right to receive tax deductible contributions to support its efforts to influence legislation. The Court reasoned that the government is not obligated to subsidize lobbying simply because it subsidizes other activities:

[T]he Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying

out of public moneys. This Court has never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right.

*Id.* at 545.

Similarly, nothing prevents United Reporting from selling or publishing the names of arrestees if they obtain the information from another source, and United Reporting, just like any other organization, may obtain the information if it intends to use it for proper purposes. The California legislature has simply elected not to aid Respondent in its commercial enterprise even as the State has done nothing to penalize or prohibit those activities. The fact that Respondent only wants to use state-collected information for commercial purposes is of no more consequence than TWR's desire to use tax deductible contributions for lobbying. See also *FCC v. League of Women Voters*, 468 U.S. 364, 386 (1984) (recognizing that government could properly prohibit state resources to be used for editorializing even as it subsidized noneditorial speech)<sup>16</sup>; *Cammarano v. United States*, 358 U.S.

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<sup>16</sup> The Court struck down the restriction in *League of Women Voters* because it determined that the restriction on editorializing would deter a public broadcasting station from engaging in the prohibited speech at all rather than simply preventing the use of the subsidy for editorializing. As the Court stated in *Rust v. Sullivan*, 500 U.S. 173, 197 (1991), "'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct." While this line can sometimes be difficult to draw in cases that involve financial subsidies because of the fungibility of money, the line between a penalty and subsidy is clear in the case of information. Unlike money, information does not "free up" other information for unauthorized uses. Either the organization uses information for the prohibited purposes, or it does not. By

498 (1959) (upholding regulation denying business expense deduction for lobbying or any non-trade related advertising even on those issues that affected petitioner's business).

The Court has even made clear that the legislature may subsidize certain viewpoints without funding other viewpoints that are specifically excluded from the project funded. Thus, the Court in *Rust v. Sullivan*, 500 U.S. 173, 179 (1991), upheld regulations which prohibited projects that received Title X funds from providing "counseling concerning the use of abortion as a method of family planning or . . . referral for abortion as a method of family planning." The Court recognized that when "Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." *Id.* at 194. Just as in the present case, the regulations in *Rust* did "not force the . . . grantee to give up abortion-related speech; they merely require[d] that the grantee keep such activities separate and distinct from Title X activities." *Id.* at 196. In other words, the government was wholly justified in ensuring that its funds did not go to subsidize a viewpoint with which it disagreed even as it funded related speech. This is not "the case of a general law singling out a disfavored group on the basis of speech content, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded." *Id.* at 194.

If anything, Cal. Gov't Code § 6254(f)(3) stands on even firmer constitutional ground than *Cornelius* and the subsidy trilogy described above because it does not classify the uses which may be made of its resources on the basis of speech.

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accepting the information for authorized uses, the organization need not relinquish other speech-related activity but simply must agree not to use the information secured from the government for that purpose.

Instead, it authorizes certain uses of the information and prevents all other uses, including *all* for-profit uses, many of which, as discussed above, do not even involve speech and others of which bear only a tenuous relationship to speech. In the subsidy cases, by contrast, the challenged conditions prevented the funds from being used for particular types of speech that are the very cornerstone of the First Amendment (*i.e.*, political advocacy, lobbying, editorializing, and speech expressing a particular point of view) while permitting it for other purposes, yet the Court nonetheless upheld the right of the government to control the use of its resources.

This case therefore does not test the limits of the principles articulated in *Rust* because it in no way discriminates on the basis of viewpoint.<sup>17</sup> The government, instead of withholding this information altogether, has simply released it for governmental purposes and purposes that are related to the goal of keeping the public informed about governmental activities.<sup>18</sup> Even viewing the statute as a

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<sup>17</sup> *Cf. Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (law that regulated hate-crimes based on speaker's motive rather than the expressive nature of the act does not implicate First Amendment). This case does not present the difficult question discussed by the Court in *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998), regarding the extent to which the state may choose to fund certain viewpoints. This subsidy has hardly been "'manipulated' to have [the] 'coercive effect'" of driving certain viewpoints from the marketplace. *Id.* at 2178. *Cf. id.* at 2184 (Scalia, J., concurring in the judgment) (arguing that the selective funding of particular viewpoints has nothing "to do with abridging anyone's speech.").

<sup>18</sup> Petitioner has no doubt that some of the services provided by the clients of United Reporting will in many cases help arrestees and victims. But the state has not chosen to release this information for all purposes that have the potential of helping arrestees and victims and then excluded commercial speech. Instead, it has released the information for the purpose of keeping the public



proscription on commercial solicitation alone - an erroneous characterization as described above - the statute is an entirely unproblematic exercise of the state's power to fund types of speech. Refusing to support the sale of information or commercial solicitation is no more viewpoint-based than a refusal to fund lobbying, editorializing, or political advocacy.

Accordingly, Respondent is simply wrong when it states that "arrestee addresses must be either public and available to *all* as mandated by the Act, or expressly exempted from public access because of a more compelling state interest." Resp. C.A. Br. 21. Respondent's position would impose heightened scrutiny upon every off-the-record briefing and every leak. This position would remove the flexibility that is necessary for state legislatures to craft the delicate balance between the public's right to know and, in this case, the right of arrestees and victims to privacy. California need not subsidize United Reporting's commercial enterprise to enable journalists or scholars to interview arrestees. Selective support that favors particular purposes or uses over others does not implicate the First Amendment.

D. The Release of Information Solely for the Particular Purposes Enumerated in Cal. Gov't Code § 6254(f)(3) Bears a Rational Relationship to the State's Legitimate Interest in Balancing the Privacy of Arrestees and Victims with the Public's Right to Know.

As Section I of this brief demonstrates, the classification drawn by Cal. Gov't Code § 6254(f)(3) does not merit heightened scrutiny because (1) the government has the right to restrict access to information without implicating the First Amendment, (2) the government may selectively release information for particular purposes and ensure that the

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informed, a purpose to which the use of the information for commercial purposes is unrelated.

information is used for that purpose, and (3) the statute is not a speech classification at all and does not discriminate on the basis of content or viewpoint. "Such a statute cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate government purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993). Under this test a classification "'must be upheld against Equal Protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* (quoting *FCC v. Beach Comm., Inc.*, 508 U.S. 307, 313 (1993)).

A brief summary of the state's interests will demonstrate the rationality of Cal. Gov't Code § 6254(f)(3). As an initial matter, the provision advances the state's interest in protecting the privacy of arrestees and victims by eliminating the greatest potential for the dissemination of their home addresses. United Reporting and similar commercial reporting services distribute the addresses in bulk to their clients and advertise their ability to do so. Further, as discussed further in section II, the inevitable result of allowing commercial use of this information will be its total public disclosure. The state legislature may rationally have determined that Section 6254(f)(3) will not result in this level of disclosure because newspapers and academics tend to use addresses to interview arrestees and victims about matters of public significance, rather than to disseminate the information further. *See Beach Comm.*, 508 U.S. at 320 (so long as the factual assumptions underlying a classification are arguable, the statute is unconstitutional) (citing *Vance v. Bradley*, 440 U.S. 93, 112 (1979)).

Further, by markedly reducing the dissemination of arrestee addresses, the statute also reduces the level of solicitation of arrestees and victims based on their status, as well the sense of personal violation at the knowledge that their address and status as an arrestee or victim is on numerous commercial mailing lists. The statute also, by preventing all



commercial use of the information, prevents employers and other commercial entities from using an arrestee's status against the arrestee and thereby serves the state's interest in protecting those who have not been convicted of a crime from discrimination.

Recognizing that many find the commoditization of private information to be a troubling societal trend, the state may also decide that it is improper to support a commercial enterprise that traffics in the personal information of California's citizens. Finally, the provision serves the dual interest of protecting the privacy of arrestees and keeping the public informed about matters of public significance by releasing the information for limited purposes. Respondent's position would force the state to choose between the two when the state has struck an entirely reasonable balance by releasing information for the purpose of ensuring that the public is kept informed while preventing the uses that will have the greatest negative impact on privacy.

## II Cal. Gov't Code § 6254(f)(3) Satisfies the Requirements of *Central Hudson*.

Under the test for evaluating commercial speech restrictions, the government must show that the challenged provision directly advances a substantial government interest and is no more extensive than necessary to serve that interest. *Central Hudson*, 447 U.S. at 566. Even assuming it is applicable, an analysis under the *Central Hudson* test in this case must take into account several factors that counsel deference to the classification the state has drawn. First, unlike the paradigmatic speech case, the state in this case has not prohibited "the dissemination of truthful, nonmisleading commercial messages." 44 *Liquormart, Inc.*, 517 U.S. 484, 501 (1996), but instead has only limited the release of state-held information. United Reporting is free to disseminate its "message" but simply cannot require the state to facilitate its efforts. Second, Section 6254(f) does not regulate commercial

speech or any other kinds of speech but rather simply prevents the acquisition of addresses from the state for commercial use as well as a wide number of other uses.

Third, the state has the power to withhold completely this information from the public domain. Requiring the state to allow commercial uses of information when it releases the information for some other purpose could force the State into withholding the information altogether. Finally and relatedly, any application of the *Central Hudson* test must take into account the state's dual interests in protecting the privacy of arrestees and keeping the public informed. The conflicting nature of these interests and the consequent difficulties in balancing them counsel increased deference to state legislatures engaged in this sensitive analysis.

## A. Cal. Gov't Code § 6254(f)(3) Directly Advances the State's Substantial Interest in Protecting the Privacy of Arrestees and Preventing State-Collected Resources From Being While Keeping the Public Informed about Matters of Public Significance

There is little question that protecting the privacy of arrestees while keeping the public informed are both substantial government interests.<sup>19</sup> Further, California also has an interest in preventing commercial interests from discriminating against them on the basis of their arrestee status. Finally, in addition to protecting arrestees against discrimination, the state has a substantial interest in removing its own contribution to that enterprise, particularly when the

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<sup>19</sup> Both the Ninth Circuit and the District Court in this case found that the interest in protecting the privacy of arrestees was substantial. *United Reporting Publ'g Corp. v. California Highway Patrol*, 146 F.3d 1133, 1135 (9th Cir. 1998) (citing *United Reporting Publishing Corp. v. Lungren*, 946 F. Supp. 822, 829 (S.D. Cal. 1996)).

state's coercive powers are providing a unique contribution to the industry by giving it access to information to which it would not otherwise have access.

Section 6254(f)(3) directly advances all of these interests. As an initial matter, Section 6254(f)(3) directly advances the state's interest in keeping the public informed about criminal justice issues. The goal of scholars and journalists is to keep the public informed and to contribute to the expansion of society's knowledge about matters of public significance. The addresses of arrestees, for example, enable journalists to interview arrestees about newsworthy crimes and about the treatment of arrestees by the State. Further, as a letter from the California First Amendment Coalition to the sponsor of the legislation stated, "address specifics are likewise typically the only way that the press can avoid confusing the identities of people with common names in crime reports." Ct. App. Supp. Excerpt. Rec. 382. Academics will be able to use the addresses to gather data for articles on similar subjects.

Cal. Gov't Code § 6254(f)(3) directly advances the privacy of arrestees and victims in several ways. First, the statute minimizes privacy invasions by preventing those uses of addresses that will result in the information's widest dissemination. The Ninth Circuit's contrary view ignores actual experience that suggests that journalists and academics, generally, do not print addresses and instead use addresses to locate people to interview or to gather data.<sup>20</sup> *Id.* (noting that

<sup>20</sup> Respondent stated in its brief below that "[u]nder section 6254(f)(3), the media may obtain and publish the names and addresses of arrestees, and may do so to increase sales." Resp. C.A. Br. 42. The hypothetical tone of the sentence is telling because the record contains evidence of only one newspaper in California that prints the addresses of arrestees and even that newspaper apparently limits its disclosures to serious crimes. Ct. App. Supp. Excerpt. Rec. 496-547. United Reporting itself states in its "Register" only that, "[n]ewspapers use these records for seed material for feature articles." Ct. App. Supp. Excerpt. Rec. at 11.

"newspapers seldom print exact addresses nowadays") Respondent similarly has never denied that political activists do not seek to disseminate the addresses of arrestees and victims.

Further, allowing the commercial use of arrestee addresses creates an "all or nothing" proposition that is entirely inconsistent with this Court's longstanding deference to states' public records laws. If this Court were to rule that the state has no basis for denying access to the information for a commercial purpose, the state will have even less justification for denying a general right of public access. After all, once it becomes possible to pay United Reporting for the information that the government provides United Reporting for free, no conceivable rationale could justify the continued denial of access to the public at large. Therefore, requiring the use of the information for commercial purposes effectively means that the state may not bar any uses of the information. The state need not have to choose between not releasing the information at all and releasing it for all purposes. Such a conclusion could very well deter California completely from releasing the information.

Indeed, if newspapers made the addresses of arrestees as widely available as the Ninth Circuit's opinion erroneously assumes, then United Reporting would only need newspaper subscriptions to obtain the information that it demands from the state. *Cf. United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. at 764 ("[I]f the [criminal history] summaries were 'freely available' there would be no reason to invoke the FOIA to obtain access to the information they contain"). This very lawsuit testifies to the fact that limiting the disclosure of arrestee addresses to journalistic uses does not result in their widespread availability. Even assuming that some local California newspapers print the addresses of arrestees, the state has an interest in reducing the dissemination of personal information of arrestees and victims whose addresses will not appear in



newspapers.<sup>21</sup> The question of whether the provision directly advances the State's interest in protecting the privacy of arrestees "cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity. Even if there were no advancement as applied in that manner . . . there would remain the matter of the regulation's general application to others." *Edge Broad. Co.*, 509 U.S. at 427.<sup>22</sup>

In contrast to the use that most if not all newspapers and academics will make of addresses, the dissemination of information is the modus operandi of United Reporting and similar organizations. Their profits rise in direct proportion to the number of organizations to whom they can sell the data, and thus, they obtain and distribute this data in bulk to as many customers as they can.

Third, the state has an interest in protecting arrestees and victims from unwanted solicitations. While a visit from a reporter can arguably be as intrusive as an attorney solicitation, reporter visits are likely to occur far less often than commercial solicitations. The countless numbers of arrestees and victims who will never see a reporter of an

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<sup>21</sup> While petitioner would disfavor a practice by newspapers of printing the addresses of arrestees *en masse*, regulating such a practice would require the state to interfere directly with the editorial discretion of newspapers, a cure that the state may deem to be worse than the disease. In any event, experience suggests that newspapers do not generally print addresses and that the occasional newspaper that does print addresses will exercise editorial discretion and not print the address of every arrestee and victim.

<sup>22</sup> Further, an "individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form." *United States Dep't of Defense v. Federal Lab. Relations Auth.*, 510 U.S. at 500 (holding that the Privacy Act forbids disclosure of union members' addresses to labor unions).

academic because their case is not newsworthy enough, will still receive commercial solicitations from organizations who obtained their addresses from United Reporting. Thus, in addition to resulting in far wider dissemination and in addition to the intrusiveness of the actual solicitation, the commercial use of information will directly confront the arrestee with the knowledge of the extent of the invasion of privacy. The arrestee will know that any commercial entity who is willing to pay for the information (1) knows the status of the arrestee and (2) knows where he or she lives.

The district court and the Ninth Circuit, while correctly recognizing that the privacy of arrestees is invaded "by the solicitor's discovery of the information that led to the solicitation," Pet App. 33a, severely underestimated the effect of the solicitation itself by simply asserting that the party receiving the solicitation can simply throw it away. In addition to the invasion caused by an unwanted solicitation, the solicitation brings home both literally and figuratively the fact that an arrestee's status is subject to widespread dissemination. The annoyance at a commercial solicitation that results from, for example, the widespread distribution of one's magazine preferences is quickly transformed into a true sense of violation at the knowledge that others know that one has been arrested and that the government is responsible for the invasion of privacy. The fact that the state allows reporter interviews of arrestees to keep the public informed about matters of public significance in no way undermines the state's interest in protecting the privacy of arrestees who will never be contacted by a reporter or academic. And the arrestee or victim who is contacted by a reporter or academic can at least take comfort that the information has not been made available to everyone willing to pay for it.

The state could thus conclude that the withholding of arrestee addresses for most purposes will advance the state's twin goals of reducing the dissemination of private information and the individual's subsequent confrontation



with the extensiveness of that violation. Thus, in a variety of ways, the invasion of privacy resulting from disclosure for commercial purposes and, inevitably if Respondent's position is adopted, the public at large is both qualitatively and quantitatively different from the invasion that results from disclosure for the few purposes enumerated in Section 6254(f)(3).

Fourth, the statute prevents employers and other commercial entities from obtaining the arrest records of employees and using it to their disadvantage. Protecting arrestees, particularly those who have not yet been convicted, from discrimination is clearly a legitimate state interest, one that California has asserted in Cal. Lab. Code § 432.7(a) (Deering 1997), which states that "[n]o employer . . . shall ask an applicant for employment to disclose . . . information concerning an arrest or detention that did not result in conviction." Cal. Gov't Code § 6254(f)(3) prevents employers from obtaining information about prospective employees that they cannot obtain by asking them directly, and United Reporting will not be able to obtain the information, sell it, and thereby profit off of its potentially improper exploitation. The provision also will prevent landlords, credit reporting agencies, and any number of commercial interests from discriminating against arrestees. This interest alone is thus more than enough to satisfy both rational basis scrutiny and the *Central Hudson* test.

The Ninth Circuit's reliance on this Court's opinion in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), was thus misplaced. In *Coors Brewing*, this Court found that the "unique and puzzling regulatory framework ensure[d] that" a prohibition on the display of alcohol content on beer labels would "fail to achieve [the] end" of preventing strength wars and therefore did not directly advance the state's interest. *Id.* at 489. The framework allowed disclosure of alcohol content on wine and spirits and also allowed brewers to indicate high alcohol content with the of descriptive terms such as "malt

liquor." *Id.* Such "exceptions and regulations," this Court found "would have counteracted any effect the labeling ban had exerted." *Id.* at 489-90.

The most obvious difference between *Coors Brewing* and the present case is that Cal. Gov't Code § 6254(f)(3) is merely a restriction on access to information and not a regulation of speech. Moreover, as described above, it is a matter of common sense that refusing to allow the commercial use of arrestee addresses will reduce the dissemination of that information and thereby reduce the scope of the invasion of the arrestee's privacy. The occasional publication of addresses of some arrestees or victims does not in any way undermine the state's interest in protecting the privacy of those whose addresses are not published and who are not contacted. Further, the state has, as discussed below, the additional interest of protecting arrestees from discrimination and ensuring that the state has not made a direct contribution to a commercial enterprise that traffics in the personal information of California's citizens.

Finally, as discussed in the next section, there was no suggestion in *Coors Brewing* of a countervailing state interest that justified, for example, the exemption from the labeling ban for alcohol and spirits. In this case the limited exceptions directly serve the state's interest in keeping the public informed about matters of public significance.

#### B. There is a Reasonable Fit Between Section 6254(f)(3) and the Competing Goals the Statute Furthers

Under the fourth prong of *Central Hudson*, "there must be a fit between the legislature's goal and method, 'a fit that is not necessarily perfect but reasonable; that represents not necessarily the best single disposition but one whose scope is in proportion to the interest served.'" 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996) (quoting *Board of Trustees v. Fox*, 497 U.S. 469, 480(1989)). In this case there

is a reasonable fit between the classification that the statute has drawn and the legislature's goal of limiting the invasion of the privacy of arrestees while keeping the public informed. In fact, this Court has long encouraged state governments to "establish and enforce procedures" governing the release of "sensitive information [in their] custody, as a less drastic means than punishing truthful publication [to] guard[] against the dissemination of private facts." *Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989). As this Court stated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975), "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and the press to publish." (Emphasis added).

Indeed, there is no other way that California could have better balanced both goals. Section 6254(f)(3) releases information for purposes that are most closely linked to the First Amendment's goal of keeping the public informed about matters of public significance while at the same time withholding information for purposes that will have the greatest impact on the privacy of arrestees and victims. As this Court held in *Edge Broadcasting*, 509 U.S. at 430-31, the First Amendment allows legislatures to make such tradeoffs to serve competing goals. To conclude otherwise would force the state to thwart one interest in favor of the other, a conclusion that the First Amendment does not require, particularly when one of the choices would undermine a central First Amendment value such as disclosures to the press.

Even if the commercial use of the information had less net impact on privacy than authorized uses (which as explained above, it clearly does not), the state could conclude that those uses better serve the state's interest in keeping the public informed about matters of public significance. So long

as withholding the information for commercial and other uses advances the state's interest in protecting the privacy of arrestees, see *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 418 (1993), the statute may prevent those uses while authorizing uses that are calculated to keeping the public informed or advancing society's knowledge about crime and the treatment of arrestees.<sup>23</sup> The fact that commercial uses have a far greater impact on privacy only makes the constitutionality of this provision even more clear.

A rule that required the state to distribute private information for every purpose if it distributed it for any purpose would thwart the legislature's ability to attempt to serve both interests simultaneously. By forcing the legislature to make an all-or-nothing choice, the legislature could very well simply decide to withhold the information entirely because of its concern for the privacy of arrestees.<sup>24</sup>

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<sup>23</sup> In the current case, the prohibition on all unauthorized uses will eliminate the greatest potential for widespread dissemination of arrestee information, whereas allowing those uses would do little to advance the state's goal of keeping the public informed. In *City of Cincinnati v. Discovery Network*, 507 U.S. 410, (1993), by contrast, the state's interest in preventing visual blight, which supposedly justified the state's ban on commercial newsracks on public property, was thoroughly undermined by allowing the use of newsracks on public property for all other speech. The statute resulted in the removal of only 62 newsracks while 1,500-2,000 still remained and thus had only a "minimal impact" upon the overall number of newsracks on the city's sidewalks. *Discovery Network*, 507 U.S. at 418. Further, the public's interest in allowing newsracks on public property was no more than the creation of a forum for speech in general.

<sup>24</sup> The interest in preventing the dilution of core First Amendment interests which has provided support for the distinction that this Court has drawn between commercial and noncommercial speech, is at its most convincing in access to information cases. See *Ohralik v. Ohio St. Bar Ass'n*, 436 U.S. 447 (1978) ("To require a



Respondent's position thus risks undermining the very values that it claims to champion. In this case, the California legislature has struck a sensible balance between these two competing goals by withholding information for those uses that would result in the widest dissemination and allowing the release for those uses that will result in less dissemination while keeping the public informed about matters of public significance.

Under Respondent's position, a state legislature that wants to release information to the public must determine whether it wants to subsidize the commercial traffic of that information at the same time. In addition to the serious privacy implications of such a decision, the public, through its elected representatives, may simply feel it is unseemly for the state to coerce individuals into providing private information to the government and then releasing it for the benefit of commercial interests. Indeed, one of the ominous trends of the information age is the commoditization of private information and its resultant widespread dissemination.

The public may make a conscious decision in the information age, that while it will not regulate the traffic of information obtained from other sources, it will not affirmatively help those enterprises to distribute private information that the state must collect for other purposes. The California legislature could not have selected any other method of preventing the coercive apparatus of the state from being used to subsidize the trafficking in private information or to prevent such information from being used against arrestees. This fit alone justifies the classification California has drawn in Cal. Gov't Code § 6254(f)(3)

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parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.")

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Ninth Circuit in this case be reversed.

Respectfully submitted,

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**Cal. Gov. Code § 6254**

Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

\* \* \* \*

- (f) Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes, except that state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (c) of Section 13960, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of

the investigation or a related investigation. However, nothing in this division shall require the disclosure of that portion of those investigative files that reflect the analysis or conclusions of the investigating officer.

Other provisions of this subdivision notwithstanding, state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:

- (1) The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.
- (2) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the

factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The name of a victim of any crime defined by Section 220, 261, 262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is the victim of more than one crime, information disclosing that the person is a victim of a crime defined by Section 220, 261, 262, 264, 264.1, 273a, 273d, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements of this paragraph.

- (3) Subject to the restrictions of Section 841.5 of the Penal Code and this subdivision, the current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator as described in Chapter 11.3 (commencing with Section 7512) of Division 3 of the Business and Professions Code, except that the address of the victim of any crime defined by Section 220, 261, 262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code shall remain confidential. Address information

4a

obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury.



(14)  
No. 98-678

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**

LOS ANGELES POLICE DEPARTMENT,

*Petitioner,*

v.

UNITED REPORTING PUBLISHING CORPORATION,

*Respondent.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF FOR RESPONDENT**

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**QUESTION PRESENTED**

Does California Government Code section 6254(f)(3) deny access to, and criminalize disfavored speech uses of, arrestee address information in public arrest records in violation of the First and Fourteenth Amendments and similar provisions of the California Constitution?

# STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding.

Respondent, United Reporting Publishing Corporation, has no parent corporation and no publicly held company owns 10% or more of its stock.

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## BRIEF FOR RESPONDENT

### STATEMENT

1. In 1968, the California Legislature enacted the Public Records Act ("Act") to ensure maximum public access to information concerning the conduct of the people's business.<sup>1</sup> Cal. Gov't Code §§ 6250, *et seq.* The preamble to the Act declares "access [to public records] is a fundamental and necessary right of every person in this state." Cal. Gov't Code § 6250. Under the Act, government records must be made public unless "exempt from disclosure by [the Act's] express provisions." Cal. Gov't Code § 6253(b).

As of January 1, 1983, the Act mandated "state and local law enforcement agencies shall make public . . . [t]he full name, current address, and occupation of every individual arrested by the agency[.]" Cal. Gov't Code § 6254(f)(1). The impetus behind this provision was the "'closing of all records of police activity in apparent retaliation for critical press accounts in some cities.'" *County of Los Angeles v. Superior Court*, 18 Cal. App. 4th 588, 596-98 (1993).<sup>2</sup> The Act also required that other arrestee

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1. California allowed public inspection of government documents well before 1968. *See* Act of March 12, 1872, § 1032, printed in 1872 Cal. Pol. Code § 183 (repealed Aug. 29, 1968) (now Cal. Gov't Code §§ 6250, *et seq.*).

2. In *County of Los Angeles*, the court reviewed the legislative history behind Assembly Bill No. 909 (the original version of section 6254(f)), noting the California Newspaper Publishers Association sought "to expose to routine access by any interested member of the public such *current* police agency records as 'activity logs,' 'original entry' documents and police blotters as a means of permitting the public and the press to monitor local law enforcement." *Id.* at 596-97 (emphasis in original); *see also id.* at 596 n.12; 597 n.13. After California's governor vetoed AB 909 as being too broad, the bill was redrafted in Assembly Bill 277 and passed, creating section 6254(f).

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information be made public, such as the arrestee's physical description and birthdate, all charges against the arrestee, outstanding warrants, and parole or probation holds. Cal. Gov't Code § 6254(f)(1).

2. In September, 1995, the California Peace Officers Association sponsored Senate Bill ("SB") 1059 which was thereafter enacted. (Ct. App. Supplemental Excerpts of Record ("SER") 247-397.) SB 1059 amended section 6254(f) to require one requesting an arrestee address from arrest records to declare under penalty of perjury that the request is being made for a "scholarly," "journalistic," "political," or "governmental" purpose or by a licensed investigator for an "investigative" purpose. (Appendix to Petition for a Writ of Certiorari ("Pet. App.") 21a & n.7.) Cal. Gov't Code § 6254(f)(3).<sup>3</sup> The statute further requires a declaration that the arrestee address will not be used "directly or indirectly to sell a product or service. . . ." Section 6254(f)(3) thus restricts the availability and use of information in original, previously public arrest records, not government compilations of records as in *United States Department of Justice v. Reporter's Committee For Freedom of the Press*, 489 U.S. 749 (1989) ("*Reporter's Committee*").

(Cont'd)

Section 6254(f) perpetuated the common law tradition of contemporaneous disclosure of arrest information "in order to prevent secret arrests and to mandate the continued disclosure of customary and basic law enforcement information. . . ." *Id.* at 598.

3. Petitioner raises for the first time privacy and safety interests of crime victims. Petitioner's failure to raise the alleged interests of victims in the courts below creates an inadequate record on this issue. United Reporting notes, however, that the legislative history of SB 1059 contains no evidence of privacy invasion or safety problems. Further, crime victims presumably benefit from information they receive from direct mail just as arrestees benefit (as discussed below). In any event, section 6254(f) and subdivision (f)(2) allow for nondisclosure of a victim's name or address where the safety of that individual is endangered.

A violation of section 6254(f)(3) is punishable as perjury with potential imprisonment for two, three, or four years. *See* Cal. Penal Code §§ 118, 126 (West 1999). Moreover, for purposes of establishing perjury, "[a]n unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false." Cal. Penal Code § 125 (West 1999).

SB 1059's ostensible purpose was to reduce the cost of informational requests to government agencies. (*See, e.g.*, SER 305.) The legislative history, however, does not explain how criminalizing some uses of arrestee addresses could save money since the information has to remain available for the many other uses permitted by the statute.<sup>4</sup> (Pet. App. 18a.) The legislative history also notes throughout that law enforcement believes commercial users of arrest information improperly "seek to profit" from the misfortune of arrestees. (*See* SER 309.)

In opposing SB 1059, the California First Amendment Coalition argued arrestee address information is "essential" to follow up on arrests, detect crime patterns and obtain other crime-related information that is "increasingly hard to come by from law enforcement agencies directly." (SER 382; *see also* Ct. App. Excerpts of Record ("ER") 561-63.) Address specifics are likewise typically the only way to "avoid confusing the identities of people with common names" (SER 382), or to ascertain who has been arrested when a name alone is not sufficient identification. Other opponents of SB 1059 argued increased competition through direct mail reduces routine legal and other fees incurred by arrestees. (SER 380-81; *see also* Steven R. Cox, Allan C. DeSerpa, & William C. Canby, Jr., *Consumer Information and the Pricing of Legal Services*, 30 J. Indus. Econ. 305 (1982) (included in SER 53-60).)

4. Moreover, as California's legislature recognized in 1982 and 1983, *see* Legis. Hist. for AB 909, at 39, 41, 43-44 and AB 277 at 221, costs of record retrieval or duplication can be recouped through provisions of the Public Records Act. *See, e.g.*, Gov't Code § 6253(b).

3. United Reporting is a publishing service that provides its subscribers the names and addresses of recently arrested individuals, as well as other information, from public arrest records. (Pet. App. 11a.) United Reporting publishes a newsletter, the "Register," for subscribers and arrestees that contains articles on legal and political subjects and lists the names and addresses of persons arrested. (See ER 195-202.) United Reporting's subscribers include attorneys, insurance companies, drug and alcohol counselors, religious counselors, and driving schools. (Pet. App. 11a; see, e.g., ER 193; 206, 213, 215-31, 233, 240-45.) United Reporting's subscribers use the data it provides to send arrestees counseling offers as well as information regarding statutory and regulatory guidelines, the specific charges the arrestee faces and the arrestee's legal rights. (*Id.*; see, e.g., ER 206 (offering a free insurance consultation and providing a pamphlet explaining administrative procedures and programs to reacquire driver's license after a DUI charge); ER 215-31 (offering free legal consultation and brochure on California gun laws); ER 240-45 (explaining post-arrest legal process and offering free legal consultation).) Arrestees believe the information they receive from United Reporting's subscribers is valuable. (See, e.g., ER 249-50 (letters addressing administrative procedures helped arrestee preserve driving privileges, obtain free legal consultations, and learn about attorneys' qualifications and fees); ER 252 (same).)

4. On May 15, 1996 (after enactment of section 6254(f)(3) but before its effective date of July 1, 1996), United Reporting filed a complaint under 42 U.S.C. § 1983 for declaratory and injunctive relief against the California Attorney General. The complaint alleged the statute violates the United States and California Constitutions. (ER 1-14; Pet. App. 25a-26a.) On June 7, 1996, the district court heard argument on the injunction. The court found "this code section appears to permit civil or criminal prosecution of anyone using such information [arrestee addresses] for commercial purposes." (ER 258.) The court denied injunctive relief but obtained the Attorney General's

commitment "(i) not to withhold any section 6254(f) information from [United Reporting] and (ii) not to prosecute any commercial use of such information by [United Reporting]." (*Id.*)

5. On July 1, 1996, police and sheriff departments statewide denied United Reporting access to public records containing arrestee addresses because its employees could not sign section 6254(f)(3) declarations. (ER 370-74, 378-80, 381-87, 486-523.) United Reporting thereafter filed an amended complaint against those agencies seeking declaratory and injunctive relief. After being served with the amended complaint, most law enforcement agencies stipulated to continue providing full arrest record information to United Reporting pending the resolution of the lawsuit. Only the California Highway Patrol, the Sheriff's Department for the County of San Diego, California, and Petitioner continued to defend the lawsuit. (See ER *passim*.)

6. The parties filed cross-motions for summary judgment. The California Attorney General maintained section 6254(f)(3) was enacted to save money. (See, e.g., ER 553 (the legislative purpose was "controlling the cost to government of providing records for commercial use"); see also ER 567.) Nonetheless, no government entity produced evidence of cost-savings when requested to do so by the district court. (Pet. App. 18a; SER *passim*.) In contrast, United Reporting established that law enforcement agencies contract to provide public arrest information to entities such as United Reporting for a price that may include a profit. (SER 639-53; ER 192.) Petitioner (but not the Attorney General) also argued section 6254(f)(3) was enacted to protect arrestees' privacy rights. Petitioner produced no evidence that any privacy invasion had existed before the statute's enactment.<sup>5</sup> (Pet. App. 18a; SER *passim*.)

5. Ironically, the California Legislature also passed laws publicizing the identities of juveniles charged with serious or violent

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7. On November 27, 1996, the district court granted United Reporting's motion for summary judgment. (ER 705-17.) The court ruled the state "functionally" imposes a limitation on commercial speech. (Pet. App. 14a.) The district court noted "[t]he government is the only source of this information [arrestee addresses] and by statute is disseminating it to everyone except commercial users." Section 6254(f)(3) has thus created "a content-based indirect limitation on commercial speech which implicates the First Amendment." (Pet. App. 14a, 16a.) The district court thereafter applied the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) ("*Central Hudson*"). (Pet. App. 16a.) The court accepted as substantial the asserted state interests in minimizing costs and protecting arrestee privacy. (Pet. App. 17a.) Nevertheless, the court found it "doubtful" section 6254(f)(3) could reduce costs, as arrestee addresses must be made available for the statutorily approved uses even if commercial uses are prohibited. (Pet. App. 18a.) In any event, the district court noted, any expense attributable to commercial speech could be charged to those users, thereby eliminating the cost issue without infringing speech. (Pet. App. 18a & n.5.)

The district court also found the purported governmental interest in protecting arrestee privacy was belied by the "potentially much more pervasive invasions of privacy" permitted by section 6254(f)(3), including having one's name and address "published in newspapers, broadcast on television, and/or obtained by an employer or even an enemy." (Pet. App. 21a.) The statute's "exceedingly narrow scope," the court concluded, betrays its true purpose: to prevent government disapproved solicitation of arrestees. (Pet. App. 20a-21a.) Arrestees may need immediate legal assistance and the "statute

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felonies by requiring public court proceedings. See *KGTV Channel 10 v. Superior Court*, 26 Cal. App. 4th 1673, 1677-79 (1994). Petitioner itself argued for publication of the names and photographs of those arrested for prostitution in Los Angeles. (SER 67.)

may . . . have been intended to prevent arrestees from obtaining counsel because law enforcement agencies find it easier to deal with arrestees who are not represented by counsel." (Pet. App. 19a, 21a & n.7.) Arrestees' interest in the information provided by United Reporting and its subscribers "so heavily outweighs any concern that arrestees may find such attorney solicitations offensive that the [government's] justification borders on the disingenuous." (Pet. App. 19a.)

8. Following entry of the district court judgment, the California Highway Patrol and the County of San Diego settled with United Reporting, paying its attorneys' fees and costs. Petitioner, but not the California Attorney General, appealed to the Ninth Circuit. (Pet. App. 26a n.1.) On appeal, petitioner waived its cost-savings argument. (Pet. App. 30a.) Petitioner instead urged the state's interest in protecting arrestee privacy and asserted a new interest: preventing the creation of unreliable criminal history data banks. (Pet. App. 32a-33a.)

The Ninth Circuit summarily rejected United Reporting's argument that its speech constituted noncommercial (or mixed) speech and accepted both asserted state interests as substantial. (Pet. App. 29a.) Nonetheless, the court found section 6254(f)(3) does not advance either interest "in a direct and material way." (Pet. App. 31a.) Specifically, the Ninth Circuit found "no evidence whatsoever" that commercial interests were likely to create unreliable information banks. (Pet. App. 32a.) The court likewise noted that the many uses of arrestee addresses permitted by section 6254(f)(3) belie any claim the statute protects arrestee privacy. (Pet. App. 33a.) Rather, section 6254(f)(3) "appears to be more directed at preventing solicitation practices." (Pet. App. 33a.) The court declined to accord that goal great weight. (Pet. App. 33a (citing *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988) ("The [privacy] invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery [through a targeted direct-mail solicitation].").) Arrestees and not the government,



the court concluded, must decide whether solicitations are unwanted. (Pet. App. 33a.)

The Ninth Circuit also held the "myriad of exceptions" to section 6254(f)(3) preclude the statute from directly and materially advancing the government's purported privacy interest and "render the statute unconstitutional under the First Amendment." (Pet. App. 34a, 35a.) After all, "[h]aving one's name, crime, and address printed in the local paper is a far greater affront to privacy than receiving a letter from an attorney, substance abuse counselor, or driving school eager to help one overcome [one's] present difficulties (for a fee, naturally)." (Pet. App. 35a.)

### SUMMARY OF ARGUMENT

Before the enactment of Government Code section 6254(f)(3), arrest records in California — by tradition and statute — were open to the public. Section 6254(f)(3), legislation sponsored by law enforcement, criminalizes the use of arrestee addresses from public arrest records to sell a product or service "directly or indirectly." The statute continues to allow the use of arrestee addresses only for certain enumerated but undefined purposes. Both the statutory language and legislative history show section 6254(f)(3) was enacted to deter commercial solicitation of arrestees by entities such as United Reporting's subscribers. The issue before the Court is the constitutionality of this statute. What is not before the Court is the propriety of other state or federal laws restricting the use of other types of governmental information.

As the courts below concluded, section 6254(f)(3) is a content-based restraint on speech, not a mere access restriction. The statute makes it a crime to use arrestee addresses obtained from public arrest records for certain disfavored speech. Accordingly, section 6254(f)(3) implicates the First Amendment and must be subjected to heightened scrutiny.

Both courts below analyzed section 6254(f)(3) as a restriction on commercial speech that must pass the four-part test set forth in *Central Hudson*. The state interests that assertedly justify section 6254(f)(3) have changed throughout this litigation. Petitioner now cites the state's interests in protecting arrestee privacy, keeping the public informed and preventing discrimination against arrestees. These alleged state interests are pretextual. In any event, section 6254(f)(3) allows far more serious invasions of privacy than those caused by an arrestee's receipt of unwanted mail. Moreover, the record establishes that the information sent by United Reporting and its subscribers is valuable to arrestees and assists them in protecting their Fifth and Sixth Amendment rights. Thus, as was true in *Greater New Orleans Broadcasting Ass'n v. United States* ("*Greater New Orleans*"), 119 S. Ct. 1923 (1999), section 6254(f)(3) cannot possibly advance the interests asserted to justify it. Further, there are several alternatives available that do not infringe First Amendment rights, including solicitation opt-out provisions, that could accomplish the state's purported goals. Thus, section 6254(f)(3) cannot pass muster under *Central Hudson*.

Section 6254(f)(3) also restrains substantial noncommercial speech and cannot survive strict scrutiny. Indeed, the Court found unconstitutional a similar statute in *Regan v. Time, Inc.*, 468 U.S. 641 (1984). Section 6254(f)(3) also unconstitutionally conditions receipt of a government benefit (access to public information) on the surrendering of speech rights (i.e., the right to solicit). The statute also unconstitutionally criminalizes the accurate publication of information from public records in violation of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) and is an unlawful prior restraint on speech.

Section 6254(f)(3) is unconstitutional even if it is viewed as a restriction on access as opposed to a content-based restraint on speech. The public has a fundamental interest in the operation of the criminal justice system. As a matter of tradition and to

preserve citizens' ability to scrutinize the activities of law enforcement personnel, arrest records historically have been open to the public. Based on that tradition and its importance in our democratic society, this Court should hold that there is a First Amendment right of access to arrest records that cannot be infringed absent a compelling state interest, an interest that is absent here. In any event, the selective disclosure of public information based on the speaker's identity has never passed constitutional muster.

Finally, section 6254(f)(3) violates the Fourteenth Amendment equal protection and due process guarantees as well as the California Constitution. This Court should affirm the holding of the Ninth Circuit Court of Appeals that the statute is unconstitutional.

### ARGUMENT

#### I. SECTION 6254(f)(3) IS A CONTENT-BASED RESTRICTION ON SPEECH THAT VIOLATES THE FIRST AMENDMENT.

##### A. Section 6254(f)(3) Restrains Speech by Criminalizing the Use of Arrest Information for Specific Disfavored Speech.

Petitioner's central premise is that section 6254(f)(3) is a mere restriction on access to government documents. On its face, however, the statute prohibits the use of arrestee addresses from public arrest records — even if lawfully obtained — “directly or indirectly” to sell a product or service. Section 6254(f)(3) thereby criminalizes the use of lawfully obtained information for specific disfavored speech, creating a content-based speech restraint like the ban on commercial newsracks invalidated in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (“Cincinnati”).

Petitioner argues United Reporting can obtain arrestee addresses from “other sources.” (Brief for the Petitioner at 9.) Practically speaking, however, there is no source other than the original arrest records. In this regard, this case is wholly unlike *Reporter's Committee*, 489 U.S. 749, in which the issue was government compilations of source documents, not the source documents themselves. Further, cost constraints and the likelihood of errors render it impractical (perhaps impossible) to discover independently the addresses of arrestees, particularly those with common names or who are arrested in large metropolitan areas.<sup>6</sup> At a minimum, such an independent search would take time, thus delaying the arrestees' receipt of valuable information about their constitutional rights. Moreover, contrary to Petitioner's assertion that the California Legislature could legitimately curtail inexpensive, more effective direct mail for solicitation of arrestees, the First Amendment's protection “cannot properly be made to depend on a person's financial ability to engage in public discussion.” *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 296 (1981) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam)).

Section 6254(f)(3) also restrains speech by limiting the use of previously public information to certain government-approved speech. Thus, a reporter can lawfully use arrestee address information from public records to write a newspaper article (approved speech), but a suburban resident cannot obtain and use such information to tell her neighbors about an area arrest (disapproved speech). A law professor can use arrestee address information in a classroom lecture or to write a law review article (approved speech), but a church or drug counselor cannot obtain and use the information to offer spiritual or drug

6. Even Petitioner acknowledges the important identification function of arrest information. (Brief for the Petitioner at 34.) Ironically, section 6254(f)(3) — by foreclosing the most reliable source of accurate arrestee address information — increases the likelihood of mistaken identity.



counseling to arrestees (disapproved speech). Arrestees themselves cannot obtain and use the addresses of other arrestees to investigate police discrimination or abuse.

Not surprisingly, every federal court considering the issue has concluded that where a state conditions access to public records on the requester's agreement not to engage in commercial speech, the First Amendment is implicated. In fact, the Ninth Circuit's holding that section 6254(f)(3) is a content-based commercial speech restriction is in accord with the decisions of the Fifth, Sixth, Tenth and Eleventh Circuits.<sup>7</sup> (Pet. App. 29a-36a (applying the *Central Hudson* test).) In *Speer v. Miller*, 864 F. Supp. 1294 (N.D. Ga. 1994), the court criticized statutes such as section 6254(f)(3) for criminalizing the use of information for disapproved speech under the guise of punishing the act of obtaining it. See *id.* at 1298. This interpretation, the *Speer* court found, explained the Eleventh

7. See *Speer v. Miller*, 15 F.3d 1007, 1010 (11th Cir.) (First Amendment challenge appropriate where state prohibits the use of public records for non-misleading, truthful commercial speech), *on remand*, 864 F. Supp. 1294, 1296 (N.D. Ga. 1994) (discussed in text); see also *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1512-13 (10th Cir.), *cert. denied*, 513 U.S. 1044 (1994) (state-drawn line based on the speech use of public records created content-based speech restriction); *Moore v. Morales*, 843 F. Supp. 1124, 1130-31 (S.D. Tex. 1994) (by restricting access to certain classes of individuals, the state is in effect thwarting the means by which solicitation is conducted), *rev'd in part*, 63 F.3d 358 (5th Cir. 1995); *Innovative Database Sys. v. Morales*, 990 F.2d 217, 221 (5th Cir. 1993) (ban on the use of lawfully acquired public information for solicitation is unconstitutional); *Amelkin v. McClure*, 168 F.3d 893, 897 (6th Cir. 1999) (statutory restriction prohibiting press from using accident reports obtained for a commercial purpose is content-based restriction violating the First Amendment), *aff'g*, *Amelkin v. Commissioner, Dept. of State Police*, 936 F. Supp. 428 (W.D. Ky. 1996); *Lavalie v. Udall*, No. 94-0404-M Civil (D.N.M. Feb. 16, 1996) (included in SER at 549-58) (state statute aimed at suppressing solicitation invalid under First Amendment); *Babkes v. Satz*, 944 F. Supp. 909, 911 (S.D. Fla. 1996) (by restricting the use to which public arrest information can be put, statute implicates the First Amendment).

Circuit's finding before remand that the statute implicated the First Amendment:

The State does not restrict all (or probably even most) possible invasions of a person's privacy. . . . Only entities intending to use the names and addresses of those mentioned therein to solicit those people or their relatives for commercial purposes are denied access. The restriction's exceedingly narrow scope betrays it as a statute designed not to protect privacy but, instead, to prevent solicit[ation] practices.

*Id.* at 1302. Even in *Lanphere*, 21 F.3d at 1516-20, the Tenth Circuit found Colorado's statute is content-based because it conditions access to public arrest records on whether the intended speech is commercial. See *id.* at 1513 & n.2 (quoting *Rust v. Sullivan*, 500 U.S. 173 (1991)) (analogizing the statute to a "case of a general law singling out a disfavored group on the basis of speech content"). Censorship is particularly abhorrent when the information suppressed is beneficial to the would-be recipient — in this case, arrestees whose liberty and property rights are at risk. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-64 (1976) ("*Virginia Pharmacy*"); *Cincinnati*, 507 U.S. at 419-20 (regulations that suppress entire modes of commercial speech are reviewed with special care).<sup>8</sup>

8. The government program at issue in *Rust v. Sullivan*, 500 U.S. 173 (allowing government to subsidize family planning that prohibits abortion counseling and related services), did not involve targeting a disfavored group on the basis of speech, and *Rust* therefore does not support Petitioner's position. Accord *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 553 (1983) ("*TWR*") (Blackmun, J., concurring) (distinguishing between government subsidized lobbying through a tax exemption (allowed) versus controlling the ability to lobby (creating "insurmountable" First Amendment problems)); *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168, 2178-79 (1998) (upholding government grant program, but noting that government may not impose a disproportionate financial burden calculated to drive certain viewpoints from the marketplace).



Section 6254(f)(3) is intended to (and does) penalize certain (i.e., commercial) speech. Accordingly, the statute must, *at a minimum*, withstand heightened intermediate scrutiny. In fact, since the statute penalizes substantial noncommercial speech — legal, medical, religious, literary, scientific, philosophical and artistic speech to cite only a few examples — it should be subject to strict scrutiny. See *Carey v. Brown*, 447 U.S. 455, 465 (1980) (applying strict scrutiny under the Fourteenth Amendment to invalidate ordinance distinguishing between labor and all other peaceful picketing) and *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777, 748-85 (1978) (applying strict scrutiny to a statute abridging free speech rights under First and Fourteenth Amendments). Accord *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) (applying strict scrutiny to a law applying in practice only to conduct protected by the First Amendment); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) (applying strict scrutiny when the circumstances suggest that enforcement of a general law regulating conduct targets particular speech); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 572-73 (1995) (applying strict scrutiny where law applied to expressive activity with apparent intent to require speakers to modify content of expression).

Petitioner erroneously contends United Reporting has no standing to assert the speech interests of its clients or to attack section 6254(f)(3) on its own behalf on an "as applied" basis. (Brief for the Petitioner at 15.) See *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977) and *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (litigants may challenge a statute because of a judicial assumption the statute's existence may cause others to refrain from constitutionally protected speech or expression); *Winters v. New York*, 333 U.S. 507, 515 (1948) (where statute imposes criminal penalties, facial challenges are more readily permitted); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (where plaintiff has alleged an intention to engage in proscribed conduct arguably affected with a

constitutional interest, he is not required to undergo a criminal prosecution to seek relief). The record is clear that United Reporting publishes the *Register* and provides arrestee names and addresses to its subscribers, that its owner and employees were denied arrestee addresses because they could not declare under penalty of perjury that these uses qualify as "journalistic" under section 6254(f)(3) (which nowhere defines the term) and further, that if they sent the *Register* to their subscribers and arrestees, it would not "directly or indirectly" result in the sale of a product or service. In any event, United Reporting desires to use arrestee addresses to sell its products and services directly — speech specifically prohibited by section 6254(f)(3).

Thus, United Reporting has standing to challenge section 6254(f)(3) on its face and as applied, as well as on behalf of its subscribers. It also has standing to assert directly the arrestees' First, Fifth and Sixth Amendment rights (discussed *infra*). See *Craig v. Boren*, 429 U.S. 190, 195 (1976) (beer vendor had standing to challenge statute prohibiting sales to males, but not to females, thereby requiring vendor to violate the males' equal protection rights); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989) (attorney could challenge a forfeiture statute on behalf of his client where attorney had a stake in assets and the statute might materially impair the ability of individuals to exercise their Constitutional rights).

## **B. Section 6254(f)(3) Cannot Pass the *Central Hudson* Test.**

### **1. Commercial Speech Restrictions Are Subject to Heightened Intermediate Scrutiny Under *Central Hudson*.**

United Reporting denies its speech is "commercial" speech. Nevertheless, since the lower courts applied *Central Hudson* to section 6254(f)(3), United Reporting addresses this argument first.

In *Virginia Pharmacy*, 425 U.S. 748, the Court first extended constitutional protection to commercial speech. That protection extends to "the communication, to its source, and to its recipients[.]" *Id.* at 756, 765. In 1996, the Court held commercial speech restrictions are subject to heightened intermediate scrutiny. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 500-01 (1996); *see also Greater New Orleans*, 119 S. Ct. at 1929 (1999).<sup>9</sup>

The extension of First Amendment protection to commercial speech reflects the Court's recognition that "commercial messages play[ ] a central role in public life," and that constitutional safeguards ensure consumer access to accurate information about goods and services. *44 Liquormart*, 517 U.S. at 495-96; *Rubin v. Coors Brewing*, 514 U.S. 476, 481-82 (1995); *Virginia Pharmacy*, 425 U.S. at 763-65. (*See also* Brief of Amici The Direct Marketing Association *passim*.) In *Virginia Pharmacy*, the Court emphasized that governmental paternalism is inconsistent with the First Amendment and that people can determine their own best interests if they are informed through open channels of communication. *Id.* at 770.

Based on its determination that commercial speech is vital to an informed public, the Court has invalidated bans on truthful, nonmisleading direct mail solicitation by lawyers and other professionals.<sup>10</sup> *See Bates*, 433 U.S. at 383. More recently, the

9. Four Justices of this Court appear to apply a presumption of invalidity to content-based restrictions on truthful, non-misleading commercial speech. *See 44 Liquormart*, 517 U.S. at 503-04 (principal opinion by Stevens, J.; Kennedy & Ginsburg, JJ., joining in Part IV of the opinion) (curtailing access to truthful information for any purpose may "serve only to obscure 'an underlying governmental policy,' " and "impede debate over central issues of public policy"); *id.* at 518 (Thomas, J., concurring).

10. *See In re Primus*, 436 U.S. 412 (1978) (reversing sanctions against an attorney who informed a victim of her legal rights regarding  
(Cont'd)

Court invalidated a federal prohibition on truthful advertising about privately operated gambling casinos. *See Greater New Orleans*, 119 S. Ct. at 1926. The presumption is that "the speaker and the audience, not the Government, should be left to assess the value of accurate and nonmisleading information about lawful conduct." *Id.* at 1935-36 (citing *Edenfield*, 507 U.S. at 767). Restrictions on truthful commercial messages often obscure an underlying governmental policy that is improper or could be implemented without burdening speech. *See 44 Liquormart*, 517 U.S. at 503. As Justice Thomas observed in *44 Liquormart*:

In case after case following *Virginia Pharmacy Bd.*, the Court, and individual Members of the Court, have continued to stress the importance of free dissemination of information about commercial choices in a market economy; the antipaternalistic premises of the First Amendment; the impropriety of manipulating consumer choices or public opinion through the suppression of accurate "commercial" information; the near impossibility of severing

(Cont'd)  
government-mandated sterilization); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985) (reversing state discipline of an attorney for newspaper advertisements promoting his services for certain cases); *Shapiro*, 486 U.S. at 473 (protecting truthful, nondeceptive letters to potential clients facing particular legal problems); *Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 101 (1990) (upholding attorneys' right to advertise legal certifications); *In re R.M.J.*, 455 U.S. 191, 203-05 (1982) (protecting attorney advertising that was not "inherently misleading" or proven by experience to be subject to abuse); *see also Edenfield v. Fane*, 507 U.S. 761 (1993) (protecting in-person solicitation by accountants); *Carey*, 431 U.S. at 700-02 (protecting advertising regarding contraceptives); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (protecting advertising regarding abortions). *Cf. Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (upholding temporal ban on attorney solicitation of accident victims).



“commercial” speech from speech necessary to democratic decisionmaking; and the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly.

*Id.* at 520.

In *Central Hudson*, 447 U.S. 557, the Court held that whether First Amendment protection extends to commercial speech depends on whether: (1) the speech concerns lawful activity and is not misleading; and (2) regulation of the speech is supported by a substantial government interest. If both (1) and (2) are established, the First Amendment requires the government to demonstrate: (3) the harms it cites are real and the speech restriction will materially alleviate them; and (4) the restriction is no more extensive than necessary. *Id.* at 566; *Edenfield*, 507 U.S. at 767. Petitioner contends *Central Hudson* only applies to direct restrictions on speech. (Brief for the Petitioner at 11-16, 32-33.) Section 6254(f)(3), however, does directly restrict speech, as discussed above. In any event, the notion that *Central Hudson* is limited to direct speech restraints is disproven by Petitioner’s own cited cases. *See, e.g., Cincinnati*, 507 U.S. at 424, 428 (invalidating a public forum restriction on commercial newsstands that rested on no more than a “bare assertion that the ‘low value’ of commercial speech [was] a sufficient justification for [a] selective and categorical ban”). *See also Grosjean v. American Press*, 297 U.S. 233, 250 (1936) (the discriminatory effect or impact of a statute — even one with a legitimate purpose — may violate the First Amendment); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (same regarding increasing the cost of free expression); *Simon & Schuster, Inc. v. Members of N.Y. Crime Victims Bd.*, 502 U.S. 105, 116-17 (1991) (same regarding imposing a financial disincentive on speech).

In *Cincinnati*, the Court made clear that *Cincinnati*’s categorical ban on commercial speech was unconstitutional

because it elevated noncommercial over commercial speech, a distinction that bore “no relationship whatsoever to the particular interests that the city” asserted. *Cincinnati*, 507 U.S. at 425. The Court further suggested that commercial speech might be entitled to “lesser protection” only when it is aimed “at either the content of the speech or the particular adverse effects stemming from that content,” and otherwise must be subject to strict scrutiny. *Id.* at 416 n.11. In any event, section 6254(f)(3) cannot even pass the *Central Hudson* test.

## **2. Section 6254(f)(3) Fails the *Central Hudson* Test.**

### **a) United Reporting’s Speech Concerns Lawful Activity and Is Not Misleading.**

Petitioner concedes United Reporting’s speech concerns lawful activity and is not misleading. (Pet. App. 30a.)

### **b) Petitioner Did Not Establish Any Substantial State Interest Supporting Section 6254(f)(3).**

The government bears the burden of identifying a substantial interest and justifying the challenged restriction. *See Greater New Orleans*, 119 S. Ct. at 1930; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983). Otherwise, a state “could with ease restrict commercial speech in the service of other objectives.” *Edenfield*, 507 U.S. at 768, 771. Here, Petitioner fails to meet its burden to show any legitimate — much less “substantial” — state interest justifying the significant speech restrictions imposed by section 6254(f)(3).

Petitioner defends section 6254(f)(3) by asserting the state’s interest in “protecting the privacy of arrestees [while] keeping the public informed” and in preventing commercial interests from discriminating against arrestees. (Brief for the Petitioner at 33.) The state interests Petitioner now asserts are different from those reflected in the legislative history, which were



different from those asserted at the district court, which were different from those argued at the Ninth Circuit. Surely if section 6254(f)(3) advanced a legitimate and substantial state interest, there would be less confusion as to what that interest is.

The legislative history of section 6254(f)(3) reflects three ostensible motivations for its enactment. First, the legislature made a value judgment that solicitation of arrestees is unseemly. (SER 305, 309.) This judgment hardly embodies a substantial state interest; indeed, it is a viewpoint-based determination that is constitutionally intolerable. (See page 23 and note 15, *infra*.) Second, the legislative history reflects the desire to control the costs “of providing records for commercial use.” (ER 553.) The district court rejected that justification and Petitioner waived it on appeal. Third, the legislative history reflects discussion about arrestee privacy, an interest argued at the district court by Petitioner (without supporting evidence) *but not by the California Attorney General*.<sup>11</sup> Petitioner also argued on appeal the need to prevent commercial databanks. It has apparently abandoned that argument, urging only variations on the arrestee privacy theme and now adding the state’s alleged interest in keeping the public informed. These shifting justifications for section 6254(f)(3) suggest pretext, not substantiality.

No evidence in the record supports the existence of any “solicitation invasion” problem; on the contrary, arrestee declarations establish the information they receive from United Reporting’s subscribers is helpful. Further, any “invasion” an arrestee could theoretically experience from unwanted mail solicitations could be avoided by simply throwing them away or through opt-out alternatives. See *Bolger*, 463 U.S. at 72; *Martin v. City of Struthers*, 319 U.S. 141 (1943) (residents’

11. The Attorney General argued at the district court that section 6254(f)(3) “permits but does not require” law enforcement agencies to provide arrestee addresses for commercial speech purposes — an argument based on a cost rationale that disproves any state interest in protecting arrestee privacy. (ER 258.)

ability to refuse solicitations adequately protected privacy); 18 U.S.C. § 2721(d) (allowing individuals themselves to opt out of solicitations); Arizona Revised Statutes § 28-452.G.2 (1998) (same). (See other alternatives discussed in Brief of Amici Individual Reference Services Group, *passim*.) Even if an asserted state interest in arrestee privacy were legitimate, it would not be substantial. Both this Court in *Paul v. Davis*, 424 U.S. 693 (1976), and the California Supreme Court in *Loder v. Municipal Court*, 17 Cal. 3d 859 (1976), have held there is no legitimate interest in protecting an arrestee’s identity. In fact, section 6254(f) *itself* makes public the name of every arrestee (and substantial other information),<sup>12</sup> and allows widespread dissemination of arrestee addresses, including publication, and unrestricted use by private investigators.<sup>13</sup>

Keeping the public informed and preventing discrimination against arrestees — the other two justifications Petitioner now

12. Section 6254(f)(1) requires that extensive arrestee information be made public including full name, occupation, physical description, date of birth, hair and eye color, sex, height, weight, time and date of arrest, time and date of booking, location of arrest, factual circumstances surrounding arrest, amount of bail set, time and manner of release or location where the arrestee is being held, all charges, outstanding warrants, and parole or probation holds.

13. Even arrest warrant information published by California law enforcement agencies on the Internet contains the suspect’s last known address. See, e.g., *Amador County Sheriff’s Office, Amador County’s Most Wanted* (visited June 25, 1999) <<http://www.sheriff.co.amador.ca.us/wanted.html>>; *Santa Barbara County Sheriff’s Department Most Wanted* (visited June 24, 1999) <<http://www.sbsheriff.org/mw/index.html>>; *Wanted by Los Angeles County Sheriff’s Department* (visited June 25, 1999) <<http://www.mostwanted.org/CA/LASheriff/>>; see also *FOIC orders Hartford police to release arrest record* (visited June 24, 1999) <<http://www.access.uconn.edu/061423.html>> (arrestee name and address information compelled to be disclosed under the Freedom of Information Act) (printed copies of Internet sites on file with counsel). Of course, all pre-conviction (as well as post-conviction) criminal proceedings are public.

asserts — could be substantial state interests in some context. Section 6254(f)(3), however, *restricts* public access to arrest information and does not address discrimination. These asserted interests are simply eleventh hour rationales for a statute intended to accomplish one primary goal: preventing solicitation of arrestees.

This Court should hold that pretextual state interests are not substantial. The government has *no* legitimate interest in depriving consumers of truthful, non-misleading information “so as to thwart what would otherwise be their [lawful] choices in the marketplace.”<sup>14</sup> *44 Liquormart*, 517 U.S. at 518, 523 (Thomas, J., concurring) (urging such censorship should be “per se illegitimate”); *see also id.* at 495-500 (Stevens, J., joined by Kennedy, Souter, & Ginsberg, JJ.), 501-04 (Stevens, J., joined by Kennedy & Ginsburg, JJ.), 509 (Stevens, J., joined by Kennedy, Thomas & Ginsberg, JJ.) (finding censorship to influence consumer behavior troubling from a First Amendment standpoint and noting the Court’s “longstanding hostility to commercial speech regulation of this type”).

**c) Section 6254(f)(3) Does Not Advance the State’s Purported Interests in a Direct or Material Way.**

Petitioner has also failed to meet its burden of showing section 6254(f)(3) materially advances the purported state interests. *See Edenfield*, 507 U.S. at 771 (the government “must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree”). This element cannot be established with speculation and conjecture, especially when “the State takes aim at accurate commercial information for paternalistic ends.”

14. *Accord Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 96-97 (1977) (ordinance forbidding “For Sale” and “Sold” signs to manipulate residents’ conduct held unconstitutional); *Bates*, 433 U.S. at 375 (lawyer advertising restriction held unconstitutional where (among other things) it rested on “the benefits of public ignorance”).

*44 Liquormart*, 517 U.S. at 507 (Stevens, J., joined by Kennedy, Souter, & Ginsberg, JJ.) (citing *Edenfield*, 507 U.S. at 770).

Section 6254(f)(3) is both overinclusive and underinclusive. Most obviously, the statute cannot possibly protect arrestee privacy or prevent discrimination as it allows widespread access to, and dissemination of, arrestee addresses for “journalistic,” “scholarly,” “political,” or “governmental” purposes. It also permits unrestricted use of arrestee addresses by a private investigator, thereby indirectly allowing use by citizens who can afford such an expense. In fact, section 6254(f)(3) does not prohibit *any* specific use of arrestee address information lawfully obtained — regardless how invasive or embarrassing — *except to sell a product or service*. This Court has never upheld a complete ban on solicitation based on the recipient’s privacy interests. As the Court held in *Greater New Orleans*, 119 S. Ct. at 1933, and *Rubin*, 514 U.S. at 487-91, a government regulation that is irrational — especially where exceptions undermine its purpose — *cannot* advance the asserted state goals.

Section 6254(f)(3) also discriminates even among commercial users based on viewpoint. The statute allows commercial speech uses of arrestee addresses where it approves of the speaker and message — such as commercial speech by a private investigator or scholar — but not where it disagrees with the speaker or the message, such as solicitation by United Reporting’s subscribers.<sup>15</sup> *See Greater New Orleans*, 119 S. Ct. at 1934 (noting that “the Government presents no convincing

15. The First Amendment precludes viewpoint manipulation. *Consolidated Edison Co.*, 447 U.S. at 546 (Stevens, J., concurring) (a regulation of speech motivated by nothing more than a desire to curtail expression of a particular point of view abridges free speech); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (government discrimination against private speech based on viewpoint is constitutionally intolerable); *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (“[O]fficial scrutiny of the content of publications as the basis for imposing a tax is entirely incompatible with the First Amendment[.]”).



reason for pegging its speech ban to the identity of the owners or operators of the advertised casinos”).

Section 6254(f)(3) is also fatally overinclusive. Any speech may fall within the statute’s prohibition if the speaker’s intent, even in part, is ultimately to sell a product or service “directly or indirectly.” Section 6254(f)(3) thereby sweeps in substantial noncommercial speech. For example, United Reporting’s newsletters (erroneously classified as commercial speech by the Ninth Circuit) contain information vital to an arrestee’s liberty, property and constitutional rights. Because those newsletters may indirectly be involved with the sale of a product or service, however, they may fall within section 6254(f)(3)’s prohibition. As the court concluded in *Speer v. Miller*, 864 F. Supp. 1294, 1301 (N.D. Ga.), *on remand from* 15 F.3d 1007 (11th Cir. 1994) (overruling Georgia’s similar statute), such statutes are unconstitutionally overbroad as they restrict access to information not only to “corrupt attorneys but also to honest attorneys, honest health care providers and other honest solicitors. . . .” *Id.* at 1301. *Accord Greater New Orleans*, 119 S. Ct. at 1935 (considering the “scope of speech” proscribed and the fact that messages “unlikely to cause any harm at all” were banned, regulation could not survive).

Notably, section 6254(f)(3)’s legislative history contains no evidence that arrestees desire to have law enforcement protect their privacy. On the contrary, the legislative history shows the state unilaterally chose to ban informational and commercial speech directed at arrestees at the expense of their rights. (See ER 249-252.) Petitioner’s position is tantamount to requiring that a gravely ill person should be spared information about possible treatment or that a pregnant woman appreciates a lack of prenatal care information.<sup>16</sup> Section 6254(f)(3) in effect allows

16. Petitioner’s reliance on *Florida Bar*, 515 U.S. 618 (upholding a temporal ban on commercial solicitation of personal injury or wrongful death clients) ignores that arrestees and accident victims have very different privacy interests.

the government to erect a wall around an arrestee’s mailbox, whether the arrestee wants the wall or not. See *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 736 (1970) (a sufficient measure of individual autonomy must survive to permit every household to exercise control over unwanted mail). Not surprisingly, the district court questioned whether section 6254(f)(3) was actually intended to deny arrestees helpful information law enforcement would prefer they not have. (Pet. App. 21a.)

Criminal defendants are benefited, not harmed, by a clear understanding of their constitutional rights and privileges and the availability of legal counsel. See *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (the defendant “requires the guiding hand of counsel at every step in the proceedings against him”) (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)); *Miranda v. Arizona*, 384 U.S. 436 (1966). Section 6254(f)(3) — by prohibiting the most efficient, direct and inexpensive method of communicating with arrestees — undermines the arrestee’s right to choose counsel. See *Ficker v. Curran*, 119 F.3d 1150, 1156 (4th Cir. 1997) (statute temporarily restricting direct mail solicitation violated criminal defendants’ Sixth Amendment right to counsel); *Cincinnati*, 507 U.S. at 427 (prohibition on use of effective method of communication is a significant restriction of First Amendment rights). Thus, even if the state interests Petitioner asserts were legitimate and substantial (which they are not), section 6254(f)(3) does not directly and materially advance them.

#### d) Section 6254(f)(3) Is Not Narrowly Tailored.

The fourth prong of *Central Hudson* requires that the speech restriction be no more extensive than necessary to serve the interests that justify it. See *Greater New Orleans*, 119 S. Ct. at 1932; *44 Liquormart*, 517 U.S. at 507-10 (Stevens, J.) (the Court clearly erred in concluding in *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986) that it was “up to the legislature” to choose suppression over a less speech-restrictive policy); *id.*



at 524-26 (Thomas, J., concurring); *id.* at 529-32 (O'Connor, J., concurring). Under the central teaching of *44 Liquormart*, the government may not restrict commercial speech to regulate behavior if non-speech-restrictive options are available. *See 44 Liquormart*, 517 U.S. at 507; *see also Greater New Orleans*, 119 S. Ct. at 1934.

Section 6254(f)(3) is not the least restrictive means of achieving the state's purported goals. For example, assuming the state could otherwise meet the *Central Hudson* test, it could allow *arrestees themselves* to opt out of solicitations by checking a box on the arrest form. That solution would advance all of the alleged state interests advocated by Petitioner without prohibiting communications desired by the arrestee. *See Legis. Hist.* at 273-75 (state considered opt-out provision with respect to crime victims). Further, state and federal laws exist (or could be enacted) to preclude the discriminatory use of arrest records without infringing on the First Amendment or the public's access to those records. *See, e.g., Cal. Lab. Code* § 432.7(a) (making it unlawful for any prospective or actual employer to use arrest information for employment decisions). The state could also engage in counter-speech to control any perceived ills associated with arrestee solicitation. Given the many less restrictive means available to achieve the state's asserted interests, section 6254(f)(3) fails the fourth prong of *Central Hudson*. *See Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637-38 (1980).

### C. Section 6254(f)(3) Cannot Survive Strict Scrutiny.

#### 1. Section 6254(f)(3)'s Restriction on Commercial Speech Cannot Survive the Strict Scrutiny Test Should the Court Choose to Apply It.

At least four Justices of this Court have questioned whether courts should review content-based restrictions on truthful commercial speech under a strict scrutiny analysis. (*See note 9, supra.*) Strict scrutiny protection for commercial speech is not

a new idea, having been endorsed by Justices Brennan and Blackmun in *Posadas*, 478 U.S. at 350-51 (Brennan, J., dissenting), and *Cincinnati*, 507 U.S. at 438 (Blackmun, J., concurring).<sup>17</sup> Justice Stevens, writing in *44 Liquormart* and joined by Justices Kennedy and Ginsburg, also recently approved this approach, stating, "[W]hen a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process [*i.e.*, prevention of overreaching or deception], there is far less reason to depart from the rigorous review that the First Amendment generally demands." *44 Liquormart*, 517 U.S. at 501. "[N]either the 'greater objectivity' nor the 'greater hardness' of truthful, nonmisleading commercial speech justifies reviewing its complete suppression with added deference." <sup>18</sup> *Id.* at 502; *see also Greater New Orleans*, 119 S. Ct. at 1936 (Thomas, J., concurring) (quoting *44 Liquormart*, 517 U.S. at 518).

The dangers of discriminating against speech based on content are just as disturbing when the speech is commercial;

17. *Accord MD II Entertainment, Inc. v. City of Dallas*, 28 F.3d 492, 495 (5th Cir. 1994) (recognizing potential application of strict scrutiny test in commercial speech context); *Hornell Brewing Co., Inc. v. Brady*, 819 F. Supp. 1227, 1232-33 (E.D.N.Y. 1993) (applying both *Central Hudson* and strict scrutiny without deciding which is required); *Citizens United For Free Speech II v. Long Beach Township Bd. of Comm'rs*, 802 F. Supp. 1223, 1232 (D.N.J. 1992) ("It is clear from the Supreme Court's recent decision in [*R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992)] that commercial speech must be protected by the usual strictures against content-based distinctions.").

18. *See also* Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 Va. L. Rev. 627, 628 (1990) (arguing the "commercial/noncommercial distinction makes no sense"); Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, & Free Speech: The Implications of 44 Liquormart*, 1996 Sup. Ct. Rev. 123, 126 (1996) ("After *Liquormart*, it is unclear why 'commercial speech' should continue to be treated as a separate category of speech isolated from general First Amendment principles.").

indeed, the dangers may be greater given the imprecision with which courts define commercial speech.<sup>19</sup> Additionally, the *Central Hudson* test has proved difficult to apply in practice.<sup>20</sup> See 44 *Liquormart*, 517 U.S. at 526-27; see also *Nordyke*, 110 F.3d at 712 ("the *Central Hudson* test is not easy to apply and the [Supreme Court's] cases summarized above might suggest it is sufficiently flexible to accommodate 'good' commercial speech and to suppress that which is 'not so good' ").

To satisfy the strict scrutiny test, the government must establish the validity of a compelling, subordinating state interest, and that the statute is narrowly drawn to achieve that end. *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939); see also *Buckley*, 424 U.S. 1 (per curiam). The government must meet this burden even if commercial and noncommercial speech

19. See, e.g., *Central Hudson*, 447 U.S. at 561 (commercial speech is "expression related solely to the economic interests of the speaker and its audience"); *Virginia Pharmacy*, 425 U.S. at 762, 771 n.24 (defining commercial speech as "speech which does 'no more than propose a commercial transaction' ") (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)); *Bolger*, 463 U.S. at 66-67 (requiring courts in mixed speech cases to look to whether the speech: (a) is advertising; (b) makes reference to a specific product; and (c) is motivated by a desire for profits); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding newspaper advertisement soliciting donations for civil rights group is not commercial speech); *Bigelow*, 421 U.S. at 822 (holding an abortion advertisement that does more than simply propose a commercial transaction is fully protected speech); *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 787-89 (1988) (holding speech is not necessarily commercial simply because it relates to speaker's financial motive).

20. Compare *Bad Frog Brewery, Inc. v. New York County State Liquor Auth.*, 134 F.3d 87, 99-101 (2d Cir. 1998), and *Nordyke v. Santa Clara County*, 110 F.3d 707, 713 (9th Cir. 1997) (applying the *Central Hudson* test in strict scrutiny fashion), with *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1311 (4th Cir. 1995) (permitting judicial deference to government censors), *vacated*, 517 U.S. 1206, *on remand*, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

are both implicated. See *Schaumburg*, 444 U.S. at 632. The expression of an idea may not be prohibited simply because society finds it offensive or disagreeable. See *United States v. Eichman*, 496 U.S. 310, 319 (1990) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)).

Section 6254(f)(3) could not survive a strict scrutiny analysis for the same reasons it fails the *Central Hudson* test. In *Regan*, 468 U.S. 641, the Court held a federal statute prohibiting the printing or publishing of illustrations of United States currency to control counterfeiting — while allowing it for "philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers, or albums" — was a content-based, unconstitutional restriction on speech. *Id.* at 648-49. Allowing the government to approve one photographic reproduction for its newsworthiness or educational value, while disallowing another because the message it conveyed was not newsworthy, "could not help but be based on the content of the photograph and the message it delivers." *Id.* at 648 (citing *Carey*, 447 U.S. at 461).

Likewise, in *Secretary of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984), this Court struck down a percentage limitation on charitable fundraising expenses. The Court ruled the statute too imprecisely accomplished the state's objective, created an unnecessary risk of chilling free speech, and was subject to facial attack. *Id.* at 965-68. As discussed above, section 6254(f)(3) makes content-based distinctions that substantially impact commercial speech but are not based upon any compelling (or even substantial) state interest. Accordingly, the statute cannot survive strict scrutiny.

## 2. Section 6254(f)(3)'s Restriction on Substantial Noncommercial Speech Cannot Survive Strict Scrutiny.

Section 6254(f)(3) also inhibits substantial noncommercial speech that falls outside the statutorily approved uses. The statute further chills speech because of its lack of clarity. For example,



may a professor who obtains arrestee addresses for a scholarly purpose thereafter write a book and “indirectly” profit from the information? May a lawyer for a civil rights group who uses arrestee addresses to inform arrestees of their civil rights (presumably a “political” purpose) thereafter file claims and receive attorneys’ fees? Does a newspaper that prints arrestee names and addresses have any duty to inquire whether a subscriber purchases the newspaper only for that service, to thereby ensure arrestee addresses are not being used “indirectly” to sell a product?<sup>21</sup>

In this case, section 6254(f)(3) swept within its reach United Reporting’s *Register* which discusses law enforcement techniques and criminal defense strategies, and editorializes on state legislation affecting arrestees and law enforcement. (See ER 195-202.) As noted above, the lower courts erroneously found the *Register* is commercial speech and therefore refused to apply strict scrutiny to section 6254(f)(3). They also erroneously found United Reporting’s information service is commercial speech. While this Court has traditionally defined commercial speech narrowly, the Ninth Circuit’s holding now reaches “any ‘expression related solely to the economic interest of the speaker and its audience.’” (Pet. App. 28a (quoting *Central Hudson*, 447 U.S. at 561).) *But cf. Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 385 (1973) (commercial speech is speech that does “no more than propose a commercial transaction”).

21. Petitioner and amicus’s contentions that arrestee names and addresses are “rarely” published is belied by the record. (See, e.g., SER 67-73, 465-547 (the *Sacramento Bee*, *Fresno Bee*, and various other publications throughout the nation routinely publish arrestee names and addresses). See also <<http://www.ci.nyc.ny.us>> (visited July 15, 1999) (Manhattan, N.Y., press releases with arrestee addresses); <<http://www.legal1.firm.edu/Sarasota/arrests>> (visited July 15, 1999) (arrest reports with arrestee addresses).

The Ninth Circuit’s characterization of United Reporting’s speech as commercial speech jeopardizes all newsletters and information services, and contravenes this Court’s decisions that speech does not lose its First Amendment protection simply because it addresses a commercial subject or money is spent to communicate it. See *Virginia Pharmacy*, 425 U.S. at 761-62 (distinguishing pricing information from editorials, or cultural, philosophical, or political speech); *Schaumburg*, 444 U.S. at 631-37 (solicitation is often combined with dissemination of information, discussion and advocacy of public issues, and is so intertwined as to merit the highest First Amendment protection). Newsletters — while historically receiving full First Amendment protection from this Court — may now receive only intermediate scrutiny based on the Ninth Circuit’s decision, especially if distributed for compensation or associated with a product or service. See *Lowe v. S.E.C.*, 472 U.S. 181, 205 (1985) (investment newsletters containing factual information and commentary, even if distributed for compensation, receive full press protection); *Pacific Gas & Elec. Co. v. Public Utils. Comm’n*, 475 U.S. 1, 8-9 (1986) (newsletter protection “extends well beyond speech that proposes a business transaction”).<sup>22</sup> (See also Brief of Amicus Curiae Newsletter Publishers Association, *passim*.) This Court should hold the *Register* is not commercial speech. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504-05 (1984) (a court must conduct de novo review of the record

22. Section 6254(f)(3) also in effect abridges all direct mail solicitation of arrestees. The argument that alternative forms of advertising are available has been rejected by this Court in other cases. (Brief for the Petitioner at 27.) See *Schneider*, 308 U.S. at 163 (speech cannot be abridged on the plea it may be exercised in some other place); *Linmark Assocs., Inc.*, 431 U.S. at 93; *Spence v. Washington*, 418 U.S. 405, 411 & n.4 (1974) (per curiam); *Regan v. Taxation with Representation*, 461 U.S. at 553 (Blackmun, J., concurring) (“It hardly answers one person’s objection to a restriction on his speech that another person, outside his control, may speak for him.”).



to ensure the speech is properly classified). It should also hold information services such as those United Reporting and amici provide are not commercial speech, since the information itself does not propose any commercial transaction. For the same reasons it cannot pass the *Central Hudson* test, section 6254(f)(3) cannot survive strict scrutiny.

#### **D. Section 6254(f)(3) Unconstitutionally Conditions Receipt of a Governmental Benefit on Surrendering Speech Rights.**

Section 6254(f)(3) conditions use of historically public arrest information in the government's possession on the user's relinquishment of speech rights. In *Perry v. Sindermann*, 408 U.S. 593 (1972), the Court stated:

For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech. . . . This would allow the government to "produce a result which [it] could not command directly."

*Id.* at 597 (citation omitted); accord *Greater New Orleans*, 119 S. Ct. at 1934 (power to prohibit or regulate conduct does not necessarily include power to prohibit or regulate speech about that conduct).<sup>23</sup> Petitioner confuses permissible state

23. This general principle has been broadly applied to welfare payments, *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969), tax exemptions, *Speiser v. Randall*, 357 U.S. 513, 519 (1958), and public employment, *Shelton v. Tucker*, 364 U.S. 479, 487-88 (1960) and (Cont'd)

encouragement or funding of an alternative activity consistent with legislative policy with impermissible direct state interference with a protected interest. See, e.g., *Maher v. Roe*, 432 U.S. 464, 475-76, 487-88 (1977) (restraints making the exercise of fundamental rights more difficult infringe those rights); *Grosjean*, 297 U.S. at 341 and *Arkansas Writers' Project, Inc.*, 481 U.S. at 229-30 (the power to tax speech based on content is the power to destroy it); *FCC v. League of Women Voters*, 468 U.S. 364, 395 (1984) (government may not condition funds on noncommercial television stations' agreement not to editorialize); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (invalidating state-created restrictions on access to contraceptives as burdening the right of privacy). Petitioner's "subsidy" argument also ignores that it has waived its cost-savings argument thereby acknowledging section 6254(f)(3) is not directed at government spending issues.

#### **E. Section 6254(f)(3) Is an Unconstitutional Prior Restraint.**

Any official restriction on speech in advance of publication is a prior restraint that carries a "heavy presumption" against its constitutional validity. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976). Prior restraints on speech may be direct (such as a restraining order) or indirect. See, e.g., *Grosjean*, 297 U.S. at 249-50 (additional tax upon publications constituted

(Cont'd)

*Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967). Accord *United States v. Kokinda*, 497 U.S. 720, 730 (1990) (restrictions on access to or use of even nonpublic fora must be "viewpoint neutral"); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226, 229 (1990) (plurality) (invalidating schemes creating a "risk" of suppressing speech); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 764 (1988) (same); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96, 101 (1972) (same); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 679-80 (1990) (Scalia, J., dissenting) ("It is rudimentary that the State cannot exact as the price of . . . special advantages the forfeiture of First Amendment rights.").

a "deliberate and calculated device . . . to limit the circulation of information"); *United States v. National Treasury Employees Union*, 513 U.S. 454, 468 (1995) (honoraria prohibition on federal employees abridged speech because it imposed "a significant burden on expressive activity" and on the public's right to read and hear what employees would say).

Here, section 6254(f)(3) criminalizes dissemination of truthful, non-misleading speech that is "directly or indirectly" associated with solicitation and is therefore a prior restraint that violates the First Amendment. *Nebraska Press Ass'n*, 427 U.S. at 558. Even if United Reporting lawfully obtains arrestee names and addresses pursuant to the journalist exception to section 6254(f)(3), it is restrained from selling them to its subscribers.

Section 6254(f)(3) may also vest state officials with discretion to determine whether a particular use of arrestee addresses is allowed by section 6254(f)(3) (which does not define any of the categories of permissible uses). For this additional reason, the statute is unconstitutional. *See FW/PBS*, 493 U.S. at 226 (any statute making the peaceful enjoyment of constitutionally guaranteed freedoms contingent upon the uncontrolled will of an official is an unconstitutional prior restraint).

#### **F. Section 6254(f)(3) Unconstitutionally Criminalizes Accurate Publication of Information From Public Records.**

This Court has repeatedly held states may not prohibit or punish the accurate publication of matters contained in public records. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975);<sup>24</sup> *Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989); *Smith v. Daily*

24. In *Cox*, the Court observed that "commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." *Id.* at 493.

*Mail Publ'g Co.*, 443 U.S. 97 (1979); *Oklahoma Publ'g Co. v. District Court*, 430 U.S. 308 (1977). Section 6254(f)(3) outlaws the use of even lawfully obtained arrestee addresses for non-approved speech and is unconstitutional under *Cox Broadcasting* and its progeny.

## **II. ACCESS TO ARREST RECORDS SHOULD BE GUARANTEED UNDER THE FIRST AMENDMENT.**

### **A. The Public Has a Fundamental Interest in Access to Arrest Records.**

#### **1. There Is a Substantial History of Public Access to Arrest Records to Preserve the Integrity of the Criminal Justice Process.**

Even if section 6254(f)(3) is viewed as an access restriction, it contravenes the First Amendment guarantee that *every person* shall retain the means to oversee core governmental functions such as arrests. Public arrest records provide "valuable protection against secret arrests and improper police tactics." *Wainwright v. City of New Orleans*, 392 U.S. 598, 606 (1968) (Warren, C.J., dissenting); *see also Davis v. North Carolina*, 310 F.2d 904, 910 (4th Cir. 1962) (Haynsworth, J., dissenting); *Engrav v. Cragun*, 236 Mont. 260, 267 (1989); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186 (Tex. App. 1975). "In the 'low-visibility' sphere of police investigatory practices, there are obvious and compelling reasons why official records should prevail over the second-guessing of lawyers and judges." *Wainwright*, 392 U.S. at 606. Secret arrest records hinder the public's ability to monitor arrests — "an important aspect of the overriding concern with preserving the integrity of the law enforcement and the judicial processes." *Lanphere*, 21 F.3d at 1519 (Aldisert, J., dissenting) (quoting *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985)); *see also United States v. Ross*, 259 F. Supp. 388, 390 (D.D.C. 1966) (open arrest records, including the name and address of



the arrestee, ensure the public's ability to guard against abuse of the arrest power).

Public arrest records serve other valuable purposes. For example, they may aid in the identification and apprehension of criminals, help solve neighborhood crime by documenting previous area arrests, and assist in filling sensitive employment positions. *See, e.g., Loder*, 17 Cal. 3d at 864-66; *Ernst v. Parkshore Club Apartments Ltd. Partnership*, 863 F. Supp. 651, 656-57 & n.3 (N.D. Ill. 1994).

From at least the time of the Magna Carta and the formalization of the writ of habeas corpus, concealment of arrest information has been an odious concept in our society. *See, e.g., Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 438 (1979). (See also Brief of Amicus Curiae Investigative Reporters Editors, Inc., *passim*.) The historical right of access to arrest and other criminal justice records is now deeply embedded in our common law. *See, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 & nn.7-8 (1978). The right is found "in the citizen's desire to keep a watchful eye on the workings of public agencies." *Id.*; *see also id.* at 616 n.5 (Stevens, J., dissenting) (the risk that government information will be reproduced and exploited for commercial purposes is "a risk the Founding Fathers accepted in adopting the free speech protections of the first amendment"). Many states ensure access to public records (including arrest records) by statute. *See, e.g., Mass. Regs. Code tit. 950 §§ 32.05 et seq.*; *Ore. Rev. Stat. § 192.501* (1997); *N.C. Gen. Stat. § 132-1.4(c)(2)* (1997). Others have elevated access to public records to a constitutional right. *See, e.g., Tennessee* (Tenn. Const. art. 1, § 19); *Louisiana* (La. Const. art. XII); *Montana* (Mont. Const. art. II, § 9).

California has also recognized the public's fundamental right to open arrest records. *See Loder*, 17 Cal. 3d at 864-66 (identifying a "compelling interest" in the retention and dissemination of arrest records, the benefits of which include a more efficient law enforcement and criminal justice process,

identification of arrestees, protection of the public from recidivist offenders, and potential discovery of further evidence). The *Loder* court noted that prompt and accurate public reporting of an arrest does not violate the suspect's privacy rights. *Id.* at 865. It also recognized the dangers of inaccurate or incomplete arrest record disclosure outside the criminal justice system, but noted extensive legislation had been enacted to avoid those dangers. *Id.* at 868-75.

Petitioner and amici argue against any constitutional right of access to arrest record information by analogizing to other governmental records as to which states or the federal government have restricted public access. Because they document a crucial step in the exercise of the state's police power, however, arrest records cannot legitimately be compared with welfare rolls, *see, e.g., 45 C.F.R. § 205.50* (1998), or marriage and divorce records, *see, e.g., Md. Code Ann., State Gov't § 9-1015* (1997), or motor vehicle registration information, *see, e.g., 18 U.S.C. §§ 2721, 2722* (1998), or driving records, *see, e.g., 75 Pa. Cons. Stat. § 6114* (1997). There likewise can be no legitimate comparison between an arrestee's privacy concerns and those of persons receiving public assistance, *see, e.g., Ind. Code Ann. § 12-14-22-8* (Michie 1998), or that of a military reserve officer in the information contained in a "financial disclosure report" required under federal regulations, *see, e.g., 32 C.F.R. § 84.21* (1998).

As Circuit Judge Aldisert noted in his dissent in *Lanphere*, 21 F.3d at 1516-20, this Court has afforded an expansive First Amendment right of access to the criminal justice process, both because its historic " 'tradition of accessibility implies the favorable judgment of experience' " and because public access plays a significant role in its functioning. *Id.* at 1516 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605 (1982) (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 589 (1980) (Brennan, J., concurring))); *see also Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("Press-



*Enterprise I*"); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"). None of the other state or federal laws to which Petitioner and Amici refer involve arrest records or present the same constitutional issues as does section 6254(f)(3).

Petitioner and Amici also rely on Freedom of Information Act ("FOIA") cases involving records that generally have no bearing on the need for an informed citizenry or public scrutiny. See, e.g., *Minnis v. United States Dep't of Agric.*, 737 F.2d 784 (9th Cir. 1984) (travel permits); *Department of Air Force v. Rose*, 425 U.S. 352 (1976) (Air Force Academy Honor and Ethics Code files); *United States Dep't of State v. Ray*, 502 U.S. 164 (1991) (interviews of Haitian nationals); *Wine Hobby USA, Inc. v. United States I.R.S.*, 502 F.2d 133 (3d Cir. 1974) (persons registered with the Bureau of Alcohol, Tobacco and Firearms to produce wine for family use). *Reporter's Committee*, 489 U.S. 749, is also inapposite. As this Court noted, "[p]lainly there is a vast difference between the public records that might be found after a diligent search of . . . local police stations throughout the country and a computerized summary located in a single clearinghouse of information." *Id.* at 764. Likewise, cases upholding use restrictions on information collected by private parties and subject to government compelled disclosure are inapposite. See, e.g., *Federal Election Comm'n v. International Funding Inst., Inc.*, 969 F.2d 1110 (D.C. Cir. 1992); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 537-39 (1987).

## **2. Public Access to Arrest Records Also Protects an Arrestee's Constitutional Rights.**

An arrest represents a powerful discretionary exercise of the state's police power and implicates the accused's fundamental constitutional rights. See *Terry v. Ohio*, 392 U.S. 1, 26 (1968); *United States v. Robinson*, 414 U.S. 218 (1973). As this Court noted in *Reporter's Committee*, 489 U.S. at 753-

54, "arrests, indictments, convictions, and sentences are public events. . . ." Open arrest records facilitate direct mail advertising and the communication of other vital information by lawyers, counselors and others that protect arrestees' Fifth and Sixth Amendment rights.<sup>25</sup> (See Section I(B)(2)(c), *supra.*) *Shapero*, 486 U.S. at 472. Even Judge Aldisert recognized in *Lanphere*, 21 F.3d at 1518, that direct solicitation may facilitate legal representation for individuals whose fundamental rights are at risk.

## **B. The Selective Disclosure of Information Based on the Speaker's Identity or Purpose Has Never Passed Constitutional Muster.**

This Court has invalidated speech restrictions that are based on a person's identity or the content of the message. *Arkansas Writers' Project, Inc.*, 481 U.S. at 229-30 (government's power to impose content-based financial disincentives based on the speaker's identity must meet the compelling interest test); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (regulations directed at a business solely on the basis of content are presumptively unconstitutional). It is also unconstitutional for the government selectively to exclude some speakers from access to information

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25. This Court emphasized the utility of direct mail concerning professional services in *Bates*, 433 U.S. at 370 nn.22-23. The Court cited *The Report of the Special Committee on the Availability of Legal Services*, printed in ABA's Revised Handbook on Pre-Paid Legal Services, at 26 (1972), which found many people forego counsel because they fear legal services are too expensive. The report also concluded the vast majority of people feel they cannot determine which lawyers are competent to handle their problems. The 1994 follow-up survey commissioned by the ABA, *Legal Needs and Civil Justice, A Survey of Americans*, printed in ABA's Revised Handbook on Pre-Paid Legal Services (1995), similarly found that most legal needs of low and moderate income households are not met by the civil justice system in part because people do not know how to find a lawyer. (See Notice of Lodgment at 339, 347).

freely available to others. *See, e.g., Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986) (selective disclosure allows government to influence public debate, a practice at odds with the First Amendment); *accord American Broad. Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977); *McCoy v. Providence Journal Co.*, 190 F.2d 760, 766 (1st Cir. 1951). *See also First Nat'l Bank of Boston*, 435 U.S. at 785 (discriminatory restrictions may represent a governmental "attempt to give one side of a debatable public question an advantage in expressing its views to people"); *Consolidated Edison Co. v. Public. Serv. Comm'n*, 447 U.S. 530, 538 (1980) (through a general speech restriction and its exemptions, the government might seek to select the "permissible subjects for public debate" and thereby to "control . . . the search for political truth"); *Cincinnati*, 507 U.S. at 424-26 (exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy in diminishing the credibility of the government's rationale for restricting speech in the first place). Section 6254(f)(3) selectively denies the use of lawfully obtained arrest information for commercial and other disfavored speech and is unconstitutional on this additional ground.<sup>26</sup>

Likewise, neither the Freedom of Information Act ("FOIA") nor most state statutes allow selective distribution of public record information based upon the identity of the speaker or the reason for the request. *See Reporter's Committee*, 489 U.S. at 771-72 (1989) ("Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest [in a particular document].'" (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975))); *Department of Air Force*, 425 U.S. at 372 (a request must turn

26. Some states do permit a charge for commercial and other uses to reflect the actual cost of making the records available. *See, e.g., Minn. Stat. Ann. § 13.03(3)* (West 1999) (allowing developmental costs). Thus, while California could constitutionally require commercial users to reimburse the state for the actual cost of duplicating arrest records, it cannot constitutionally deny them the use of those records.

on the basic purpose of FOIA to open government action to public scrutiny rather than on the particular purpose for which the document is being requested); *Nixon*, 435 U.S. at 592 (recognizing discriminatory access by government has never been constitutionally acceptable).<sup>27</sup>

### **C. First Amendment Protection Should Be Extended to Arrest Records to Ensure Scrutiny of the Core Government Function of Arrest.**

#### **1. The Substantial History of Public Access to Arrest Records Satisfies the First Prong of the Test for Affording a Constitutional Right of Access.**

The historic importance of an open criminal justice system, coupled with the need for citizens to monitor and participate in government, caused this Court in 1980 to mandate a constitutional right of access to certain core criminal justice information — a protection that has been expanded and strengthened in the intervening years. In the "watershed case" of *Richmond Newspapers*, 448 U.S. at 576, this Court made clear that the First Amendment prevents government from denying access to criminal trial proceedings absent a finding that closure is essential to preserve a more compelling interest. The Court stated: "Today . . . for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment." *Id.* at 569, 583; *accord Press-Enterprise I*, 464 U.S. at 508-09; *Press-Enterprise II*, 478 U.S. at 12-13 (extending the presumption to preliminary hearings); *Waller v. Georgia*, 467

27. *See also* Kenneth C. Davis, *Administrative Law* §§ 3A.4-3A.5 (1st ed. Supp. 1970), *cited in Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645, 656 n.9 (1974) (noting FOIA never allows for balancing based upon the special needs of private parties); Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law* § 5.3 (3d ed. 1994) (records not exempt must be disclosed to all).



U.S. 39, 46-47 (1984) (extending right of access to pretrial suppression hearings outside the presence of a jury).<sup>28</sup>

This First Amendment protection has been extended by the First, Second, Fourth, Eighth, Ninth, Tenth, Eleventh and District of Columbia Circuits (as well as numerous district and state courts) to ensure public access to various criminal records, including plea agreements, presentencing documents, names and addresses of jurors after trial, search warrants and supporting affidavits, arrest incident information, voir dire questionnaires and confessions.<sup>29</sup> The history of public arrests supports extending a constitutional right of public access to arrest records. Indeed, even the Solicitor General acknowledges "a governmental decision not to provide any information" about arrests could prove troublesome given the "historic tradition of

28. Petitioner's reliance on pre-1980 cases — before the First Amendment right of access was established — is misplaced. In *Richmond Newspapers*, this Court distinguished a number of pre-1980 cases including *Gannett Co. v. DePasquale*, 443 U.S. 368, 394 (1979); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Zemel v. Rusk*, 381 U.S. 1 (1965); accord *Nixon*, 435 U.S. at 609. As Justices Brennan and Marshall commented, such decisions stand only for the proposition that a privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality. *Id.* at 586-87. These cases "neither comprehensively nor absolutely deny that public access to information may at times be implied by the First Amendment and the principles which animate it." *Id.* at 586.

29. See, e.g., *Phoenix Newspapers, Inc. v. District Court*, 156 F.3d 940 (9th Cir. 1998); *United States v. Valenti*, 987 F.2d 708 (11th Cir. 1993); *Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991); *Oregonian Publ'g Co. v. District Court*, 920 F.2d 1462 (9th Cir. 1990); *In re Globe Newspaper Co.*, 920 F.2d 88 (1st Cir. 1990); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497 (1st Cir. 1989); *United States v. Suarez*, 880 F.2d 626 (2d Cir. 1989); *United States v. Haller*, 837 F.2d 84 (2d Cir. 1988); *In re New York Times Co.*, 828 F.2d 110 (2d Cir. 1987); *In re Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986).

making public at least some information about the exercise of that core government power." (Solicitor General's Brief at 27 n.15.) *Accord Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978) (the nation's historic distrust of secret proceedings and their inherent dangers implicate a major purpose of the First Amendment—"discussion of governmental affairs").

## 2. The Function Prong of the Test for Affording Constitutional Access to Arrest Records is Also Satisfied.

The second prong of the First Amendment test looks to "whether public access . . . plays a particularly significant positive role in the actual functioning of the process." *Press-Enterprise II*, 478 U.S. at 11. "[T]he First Amendment . . . has a structural role to play in securing and fostering our republican system of self-government." *Richmond Newspapers*, 448 U.S. at 587 (Brennan & Marshall, JJ., concurring) (citations omitted). "The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication." *Id.* at 587-88.

As this Court has recognized, an open criminal justice system increases public confidence, quality and fairness in the system, protects against discriminatory and retaliatory behavior, and improves the conduct of public servants by subjecting them to public scrutiny. *Richmond Newspapers*, 448 U.S. 555 *passim*; *Press-Enterprise I*, 464 U.S. 501 *passim*; *Press-Enterprise II*, 478 U.S. 1 *passim*; see also *Breier*, 89 Wis. 2d at 438 (information concerning the operation of police is vital to our democratic system and an integral part of constitutional due process); *Dayton Newspapers, Inc. v. City of Dayton*, 45 Ohio St. 2d 107, 112 (1976) (Corrigan, Celebrezze, & Brown, JJ., concurring) (same); *Morrow v. District of Columbia*, 417 F.2d 728, 741-42 (D.C. Cir. 1969) (requirement of open arrest books



is to prevent "secret arrests") (citing H.R. Rep. No. 83-2332 (1954) (requiring precinct arrest books to be public)). Curbing abuse by law enforcement<sup>30</sup> is possible only if citizens can learn how arrest power is exercised. *See, e.g., Lanphere*, 21 F.3d 1508, 1519 (Aldisert, J., dissenting) (arguing a First Amendment right of access to arrest records is a compelling interest that cannot be overridden by concerns of preserving integrity of law enforcement); *Houston Chronicle Publ'g Co.*, 531 S.W.2d 177; *Herald Co. v. McNeal*, 553 F.2d 1125 (8th Cir. 1977) (discussing a colorable constitutional right of access to police arrest registers); *Student Press Law Ctr. v. Alexander*, 778 F. Supp. 1227, 1234 (D.D.C. 1991) (finding a probability of success on the merits of establishing a First Amendment right of access to campus police arrest and incident reports).

Petitioner has established no legitimate state interest, much less an "overriding" one, to justify ignoring the fundamental need for public scrutiny of the arrest function. Accordingly, this Court should hold there is a First Amendment right of access to arrest records, a right unconstitutionally infringed by section 6254(f)(3).

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30. *See, e.g.,* Editorial, *A Guilty Plea to Shocking Violence*, Sun-Sentinel, May 26, 1999, at 22A; International News, *Thousands Protest N.Y. Police Brutality*, Deutsche Presse-Agentur, August 29, 1997; Erin Teixeira, *Washington Protest Decries Police Brutality*, Baltimore Sun, April 4, 1999, at 3A; *see also* numerous recent cases alleging police abuse, such as *Soto v. Flores*, 103 F.3d 1056 (1st Cir. 1997); *Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998); *Smith v. City of Chicago*, No. 97-C-0763, 1999 WL 162811, at \*1 (N.D. Ill. 1999); *Perkins v. City of Chicago*, No. 97-C-2389, 1998 WL 89296, at \*1 (N.D. Ill. 1998).

### III. SECTION 6254(f)(3) VIOLATES THE FOURTEENTH AMENDMENT EQUAL PROTECTION AND DUE PROCESS GUARANTEES.

#### A. Section 6254(f)(3) Denies United Reporting Equal Protection Under the Law.

The Fourteenth Amendment prohibits states from denying any person "equal protection of the laws." Legislative classifications may not constitutionally infringe upon the exercise of a "fundamental right," and all persons in similar circumstances must be treated alike. *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982); *see also Railway Express Agency v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J. concurring).

Discriminatory burdens on First Amendment rights are subject to strict scrutiny, whether analyzed under the First Amendment or the equal protection clause. *See, e.g., Arkansas Writers' Project, Inc.*, 481 U.S. at 229; *Police Department of Chicago v. Mosley*, 408 U.S. 92, 101 (1972) ("*Mosley*"). "[F]or equal protection purposes, [a statute's] impingement need not violate the First Amendment directly; its differential effect upon various speakers can in and of itself violate the Equal Protection Clause, even if the regulation is permissible under the underlying substantive constitutional provision." *Special Programs, Inc. v. Courter*, 923 F. Supp. 851, 857 (E.D. Va. 1996), *relying on Mosley*, 408 U.S. 92 and *Plyler*, 457 U.S. 202 (holding that classifications infringing the ability to solicit are subject to strict scrutiny).

The state has the burden of showing any restriction impacting speech is narrowly tailored to achieve a compelling, subordinating state interest. When legislation affecting speech is underinclusive or penalizes conduct that is indistinguishable in view of the law's ostensible purpose, it raises suspicion that the law's true target is the *message* of the restricted speech, a violation of the First Amendment. *See News America Publ'g*,

*Inc. v. F.C.C.*, 844 F.2d 800, 805 (D.C. Cir. 1988) ("The Supreme Court has recently hinted at a readiness to infer censorial intent from legislative history and to invalidate laws so motivated") (citing *Minneapolis Star*, 460 U.S. at 579-80).

Here, as discussed above, section 6254(f)(3) imposes a substantial limitation on speech. It criminalizes the use of arrestee address information for solicitation but allows it for numerous other purposes that are just as likely to invade arrestees' privacy. Moreover, there is no reason to treat United Reporting's *Register* differently than any other scholarly or journalistic newsletter, and Petitioner has offered none.<sup>31</sup>

A court can find unconstitutional discrimination even without evidence of an improper censorial motive. *Arkansas Writers' Project, Inc.*, 481 U.S. at 228. Here, however, section 6254(f)(3) was carefully crafted to burden commercial solicitation, while accommodating the economic interests of certain powerful groups. See Legis. Hist. (June 4, 1996 letter) at 4 ("While these records are justifiably public in many ways, the unsolicited direct mail advertisements are unwarranted."). Thus, even if legislative motive were necessary, section 6254(f)(3) is unconstitutional.

#### **B. Section 6254(f)(3) Denies United Reporting and Others Due Process of Law.**

The Fourteenth Amendment also forbids states from depriving any person of personal rights without due process of law, and from enacting arbitrary and unreasonable legislation infringing constitutional rights. Freedom of speech and press fall within due process protection even where "the dissemination

31. Contrary to Petitioner's contention, this issue is indeed before the Court as United Reporting could not sign the declarations required by section 6254(f)(3) for fear of criminal liability. (ER 192; SER 441-42.) See *Greater New Orleans*, 119 S. Ct. 1928 (but for threat of sanctions, Petitioners would broadcast advertisements for private casinos).

takes place under commercial auspices." *Smith v. California*, 361 U.S. 147, 149-50 (1959); see *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964).

The failure of a statute impacting free speech to give fair notice of prohibited acts violates procedural due process rights. See *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 287 (1961) (the vice of unconstitutional vagueness is aggravated where a statute operates to inhibit individual freedoms protected by the Constitution); *NAACP v. Button*, 371 U.S. 415, 432 (1963) (courts may not presume ambiguous statutes curtail as little constitutionally protected conduct as possible). Vagueness in speech regulations also creates an impermissible risk of discriminatory enforcement. See *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). Statutes that broadly prohibit speech are also facially invalid under the due process overbreadth doctrine. In *Chicago v. Morales*, 119 S. Ct. 1849 (1999), this Court invalidated a loitering prohibition that was vague in scope and encompassed a "great deal of harmless behavior."<sup>32</sup> *Id.* at 1851. The Court underscored that vagueness may invalidate a criminal law where: (a) it fails to provide notice enabling ordinary people to understand what conduct it prohibits; or (b) it authorizes arbitrary and discriminatory enforcement. See *id.* at 1859.

Section 6254(f)(3) exhibits the same deficiencies. Petitioner has not proved California has *any* interest in protecting arrestee addresses, much less the substantial interest required by the Fourteenth Amendment. United Reporting and others have been forced to forego fundamental rights of free speech for fear of criminal prosecution, due in part to the vagueness of section 6254(f)(3). (ER 189-94.) Indeed, section 6254(f)(3)'s vagueness has a chilling effect even on those whose speech California may

32. The Court declined to apply the overbreadth doctrine where the term "loiter" did not prohibit any form of conduct intended to convey a message and specifically excluded assemblies designed to demonstrate a group's support of, or opposition to, a particular point of view. *Id.* at 1857.

have intended to allow. *See Baggett*, 377 U.S. at 372. "The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform [citizens] what is being proscribed." *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967).

Section 6254(f)(3)'s prohibition on the use of arrestee addresses "directly or indirectly" to sell a product or service (also undefined) raises additional vagueness concerns. Liability for perjury may attach even though the disseminator of the information was not involved in the later commercial use. Section 6254(f)(3) conceivably places United Reporting and others in the impossible position of predicting (at risk of criminal prosecution) whether a subsequent acquirer will misuse arrestee addresses. *See Baggett*, 377 U.S. at 369.<sup>33</sup>

#### IV. SECTION 6254(f)(3) ALSO VIOLATES THE CALIFORNIA CONSTITUTION.

Article I, section 2 of the California Constitution provides even broader, more expansive protection for speech than does the First Amendment. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980); *see also Wilson v. Superior Court*, 13 Cal. 3d 652, 658 (1975); *Blatty v. New York Times*, 42 Cal. 3d 1033, 1041 (1986). Given the California Supreme Court's determination that there is an overriding public interest in identifying and notifying the public of arrestees charged with crimes, California's broader free speech guarantee provides yet another (independent) basis for invalidating section 6254(f)(3).

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33. Section 6254(f)(3) is likewise unconstitutional on overbreadth grounds. The statute is an outright ban on commercial solicitation, conduct protected by the First Amendment. A law is facially invalid if it "does not aim specifically at evils within the allowable area of State control but . . . sweeps within its ambit other activities" which are protected by the First Amendment. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

#### CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Ninth Circuit Court of Appeals and hold section 6254(f)(3) is unconstitutional.

Respectfully submitted,

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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1999

Los Angeles Police Department,

*Petitioner,*

v.

United Reporting Publishing Corp.,

*Respondent.*

On Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

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## REPLY OF THE PETITIONER

None of the arguments advanced by Respondent and its supporting *amici* (collectively "Respondent") justify the Ninth Circuit's decision invalidating Cal. Gov't Code 6254(f)(3) under the First Amendment. Three arguments merit discussion here. First, Respondent is triply wrong when it claims that Section 6254 irrationally restricts the use of arrest records in commercial speech while permitting the use of the same information for many other purposes. In reality, the statute (i) restricts access to (not use of ) government records, (ii) does so only for two pieces of information – the victim's and arrestee's addresses, and (iii) is not directed at commercial speech at all. Second, the historical evidence collected by Respondent does not come close to establishing that there is a First Amendment right of general public access to the information in question here: the addresses of arrestees and crime victims. Third, Respondent's allegations that certain provisions of Section 6254 are unconstitutionally vague or improperly discriminate against Respondent's publication, "The Register," are not properly presented by this facial challenge to the statute.<sup>1</sup>

Before expanding on those points, Petitioner emphasizes again that this Court's precedents properly leave it to legislatures to determine whether and how to release government records that contain private information. This Court has long been aware "of the threat to privacy implicit in the accumula-

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<sup>1</sup> For obvious reasons, Petitioner will not address Respondent's argument that Section 6254 violates the *California* Constitution. Resp. Br. 48. Petitioner also will not address several theories that Respondent advances in passing, none of which were discussed by the lower courts. These include the arguments that Section 6254 violates Respondent's rights to due process and equal protection, and also is unconstitutionally overbroad and underinclusive. *Id.* 45-48.

tion of vast amounts of personal information in computerized data banks or other massive government files," including through "the enforcement of the criminal laws." *Whalen v. Roe*, 429 US 589, 605 (1972). This case presents the question whether, in the face of ever-changing technology and concerns for privacy, this Court should constitutionalize a right of access to this information for all those who wish to profit from its dissemination. It simply cannot be that California's efforts to ensure that the public is informed about crime require the state to support a private business in its efforts to sell private information about the citizenry. Such a holding would contravene this Court's repeated admonition that the release of government records is a matter of legislative grace and that the government's decision not to subsidize speech does not implicate the First Amendment. The judgment below accordingly should be reversed.

**I. Section 6254 Is A Valid Restriction On Access To Government Records That Balances Individual Privacy And Benefits To The Public.**

Respondent proceeds from the false premise that Section 6254 restricts commercial speech. Although Respondent never acknowledges this basic point, there is no question that the statute does not actually regulate speech. Instead, Section 6254 is a restriction on *access* to government records. Respondent therefore is reduced to arguing that Section 6254 is invalid because it purportedly permits access to arrestee addresses for essentially any purpose other than commercial speech.

Respondent's view – which the lower courts accepted – misreads Section 6254. In reality, the statute unambiguously requires that almost all information about crimes, crime victims, and arrestees be released to all persons and entities, including Respondent. But Section 6254 withholds two pieces of personal information – the arrestee's and victim's addresses – except in limited instances in which release would

produce an overriding public benefit. The statute thus limits access to only a small subset of crime-related information and simply does not create the commercial / noncommercial and speech / non-speech distinctions that Respondent envisions. Instead, Section 6254 reasonably balances the public's right to know with the right to individual privacy.

a. Section 6254 requires the release of essentially all information regarding crimes, crime victims, and arrestees to any person and for any purpose. Respecting the crime and the victim, this information includes:

the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including \* \* \* the time, date, and location of the occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved.

Cal. Gov't Code 6254(f)(2). Respecting the arrestee, the state must release:

[t]he full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.

*Id.* § 6254(f)(1).

With respect to the addresses of arrestees and crime victims, that information must be released for any "scholarly, journalistic, political, or governmental purpose, or \* \* \* for

investigation purposes by a licensed private investigator.” No person may request address information for one of these permitted purposes absent a certification that the requester will not use the information “to sell a product or service.” Cal. Gov’t Code 6254(f)(3).<sup>2</sup>

b. Respondent plainly is wrong to allege that Section 6254 is a speech restriction. Although the Ninth Circuit characterized the speech interest at stake in this case as Respondent’s ability to advertise, Pet. App. 29a, Respondent contends here that its sale of addresses to third parties is itself speech. Even accepting that as true, Section 6254 is not a speech restriction because the statute simply restricts the ability to acquire, not to sell or to transmit, addresses. The statute limits only the

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<sup>2</sup> Respondent thus is not correct when it argues that “section 6254(f)(3) does not prohibit *any* specific use of arrestee address information lawfully obtained – regardless how invasive or embarrassing – *except to sell a product or service*.” Resp. Br. 23 (emphasis in original). The statute restricts only access to (not use of) address information and permits access only for the few purposes set out in the statute.

Of all Respondents’ other mischaracterizations of Section 6254, only two require a direct reply. First, Respondent wrongly contends that Petitioner’s defense of Section 6254 “is tantamount to arguing that a gravely ill person should be spared information about possible treatment.” Resp. Br. 24. The appropriate analogy is that if the state requires gravely ill people to identify themselves to the government, Petitioner believes those persons have an interest in maintaining their privacy and in deciding for themselves whether and how to seek treatment. Second, *amicus* Reporter’s Committee for Freedom of the Press *et al.*, at 26 n.26, states without any explanation that “Petitioner apparently assumes, contrary to the presumption of innocence afforded by our Constitution, that a presumption of guilt attaches upon arrest.” Precisely the opposite is true. Persons who are arrested (as opposed to convicted) or who are the victims of crime have an interest in maintaining that as a private fact.

state’s assistance and does so only in the sense that the government’s failure to provide a private party with any resource indirectly limits the sale of that resource.<sup>3</sup>

Respondent therefore must contend that every restriction on the release of any government record (whether for national security, privacy, or any other reason) is a speech restriction subject to the First Amendment. But there can be no real question that the state could withhold access to address records entirely. As this Court repeatedly has held, access to government aid in obtaining private information is a matter of “legislative grace,” *Seattle Times Co. v. Rhinehart*, 467 US 20, 34 (1984), the Constitution is “neither a Freedom of Information Act nor an Official Secrets Act,” *Houchins v. KQED*, 438 US 1, 14 (1978) (plurality opinion), and a right of access to government proceedings only attaches when there has been an “unbroken, uncontradicted” tradition of access,

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<sup>3</sup> In this context, Respondent’s argument must be that the state, by not releasing addresses, is itself refusing to speak to Respondent, which in turn interferes with Respondent’s ability to speak to others by selling the information received from the government. As such, this case is governed by this Court’s decisions holding that the government need not subsidize speech. *See generally* Pet. Open. Br. 26-30 (discussing cases holding that government may refuse to fund one type of speech so long as it does not penalize speech). “The reasoning \* \* \* is simple: ‘although government may not place obstacles in the path of a person’s exercise of speech, it need not remove those not of its own making.’” *Regan v. Taxation With Representation*, 461 US 540, 549-50 (1983) (quoting *Harris v. McRae*, 448 US 297, 316 (1980) (alterations omitted)). It therefore is no answer that the state could recoup the costs of providing address records through a fee. Resp. Br. 3 n.4. Instead, the relevant point is that the First Amendment does not require the government to facilitate speech. Here, even if California were to charge Respondent, the state nonetheless would be “subsidizing” Respondent’s activities by providing Respondent with a cost-efficient means of acquiring address information.



*Richmond Newspapers v. Virginia*, 448 US 555, 572 (1980). See generally Pet. Open. Br. 16-25.<sup>4</sup>

Respondent's only answer is that Section 6254 is unique because, at bottom, the statute is intended to operate as a speech restriction by preventing the commercial solicitation of arrestees. *Contra Turner Broadcasting System v. FCC*, 512 US 622, 652 (1994) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."). That is true only insofar as *every* restriction on the release of government records purposefully prevents the further dissemination of that information. In other words, the government restricts the release of personal medical records, 5 USC 552(b)(6), not just to avoid misuse by the initial recipient but also because that recipient may forward the records to 500 other people as an act of "free speech."

In this case, Respondent specifically misconstrues California's effort to protect individual privacy. It is common ground that the address information withheld under Section 6254 is useful for two purposes: (i) as a means of positive identification (distinguishing between multiple individuals with common names); and (ii) as a point of contact. The California legislature has determined that positive identification and contact of arrestees and crime victims constitute an unwarranted invasion of privacy. Importantly, Section 6254 limits such privacy invasions whether or not they arise from speech: Respondent cannot acquire addresses to sell them to employers who want to determine if job applicants have been

<sup>4</sup> Respondent erroneously claims that Petitioner is relying on the syllogism that "greater power includes the lesser." This is not a case in which the government claims that the ability to prohibit primary conduct (e.g., gambling) confers the power to restrict speech regarding that conduct (e.g., gambling advertisements).

arrested, nor are addresses available to curiosity seekers or vigilantes.<sup>5</sup>

c. This suit arises only because California has taken the further step of releasing address information – and thereby facilitating positive identification and providing a point of contact – in a limited set of instances, each of which fulfills an overriding public purpose. Critically, these purposes are unrelated to the recipients' viewpoint, the content of their speech, or indeed speech at all. Address information is collected principally for the "governmental" uses permitted by Section 6254. In addition, scholarship and journalism inform the public regarding police practices, arrest patterns, and the effect of crime on victims. "Political" uses of address information relate directly to the process of governing, not private gain. Finally, legitimate investigations by private investigators are government-licensed adjuncts to the state's own law enforcement efforts.

These categories defy Respondent's claim that Section 6254 distinguishes between commercial and noncommercial uses of address information.<sup>6</sup> The obvious example is that the

<sup>5</sup> Although Respondent focuses on its clients' desire to contact arrestees, which the state deems an invasion of privacy, positive identification has substantial effects on individual privacy as well. Once in possession of the address, one can link arrestees and crime victims with the other demographic information contained in arrest reports, as well as data collected from third parties. It is this possibility that gives rise to the state's interest in not making government records available to facilitate the creation of informational databases about individuals. This concern is even more grave with respect to other classes of records collected in the Appendix to the Petition for Certiorari that states consistently withhold from commercial users, such as welfare rolls and election contribution lists.

<sup>6</sup> Even Respondent seems to acknowledge this point in arguing that Section 6254 restricts access for "noncommercial" purposes, including "legal, medical, religious, literary, scientific, philosophical and artistic" uses of address information. Resp. Br. 14.

statute equally restricts access for all of Respondent's customers, whether commercial (e.g., law firms) or noncommercial (e.g., religious counselors). Although the statute does not permit access to address information for most commercial uses, including an employer's unlawful attempt to determine whether an applicant or employee has been arrested,<sup>7</sup> those purposes involve private gain. By contrast, when commercial uses result in an overriding public benefit – such as private investigations and journalism (which Respondent notes is a profit-making enterprise) – the state grants access. Similarly, the statute forbids access for *noncommercial* uses for private gain (such as curiosity seeking) but permits access for public benefit (such as scholarship and politics).

Respondent is equally wrong to claim that Section 6254 distinguishes between speech-related and non-speech related uses of address information. The statute permits access to address records for many other speech-related purposes that have an overriding public benefit, including journalism, published scholarship, and political advocacy. Section 6254 also withholds access for some non-speech related purposes (e.g., idle curiosity and employment decisions by businesses) but grants access for others (e.g., private investigation). In each respect, the lines drawn by the statute turn not on the viewpoint of the party requesting address information but instead on the Legislature's studied conclusion that some – but not all – uses of address information have a public benefit that is sufficiently weighty to overcome the interest in individual privacy.

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<sup>7</sup> Compare Resp. Br. 36 (arrest records “assist in filling sensitive employment positions”) and *Amicus* Br. of Individual Reference Services Group *et al.* 2 (explaining that *amicus*’ members obtain arrest report “information from certain states for use for employment screening of, for example, school bus drivers, child care workers, and nursing home orderlies”) with Cal. Lab. Code 432.7 (forbidding employers from asking job applicants about arrests).

Respondent's contrary view of the statute apparently stems from a clause in Section 6254 that requires that parties with a permissible basis for requesting address information also certify they will not use the addresses “to sell a product or service.” Cal. Gov't Code 6254(f)(3). But this clause simply ensures that a party will not circumvent the statute's carefully defined limitations by requesting access to address information for a permitted purpose (such as journalism) only to also make wider use of the information when the resulting invasion of privacy would outweigh any public benefit. For example, assuming that Respondent has a legitimate journalistic purpose in requesting address information for its publication, “The Register,” *see infra* at 17-18, the clause in question is the most reasonable means of preventing Respondent from subsequently selling the addresses for a profit. California's only alternative to this access restriction would be to ban the *use* of lawfully possessed address information in selling a product or service, which, if anything, would be more troubling as a restriction on speech. *See Florida Star v. B.J.F.*, 491 US 524, 534 (1989) (encouraging states to adopt restrictions on access to government records “as a less drastic means than punishing truthful publication [to] guard[] against the dissemination of private facts”).

d. Respondent also is wrong to rely on this Court's decisions holding that a commercial speech restriction is invalid when it “distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all.” *Greater New Orleans Broadcasting Assn. v. United States*, 119 S. Ct. 1923, 1935 (1999) (restriction on broadcast advertisement of private casino gambling, but not state-run, tribal, nonprofit, and occasional casino gambling); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995). Unlike Section 6254, the statutes presented in those cases were direct speech restrictions. But just as important, those statutes were “so pierced by exemptions and inconsistencies



that the Government [could not] hope to exonerate [them].” *Greater New Orleans*, 119 S. Ct. at 1933. Section 6254, by contrast, permits access to address information only in limited circumstances that differ both in kind and in degree from Respondent’s desire to sell addresses in bulk.<sup>8</sup>

This lawsuit is proof positive of the statute’s rationality. Respondent maintains that Section 6254 irrationally mandates the release of address information for many purposes, resulting in widespread public dissemination through newspapers, television, scholarship, and by private investigators. But Respondent also maintains that Section 6254 completely blocks its access to address information. Those two positions cannot be reconciled: if the statutory exceptions emphasized by Respondent in fact led to the general public dissemination of address information, Respondent and its customers would have access to the material and hence no cause to complain.

The truth of the matter is that Respondent is simply wrong to contend that Section 6254 leads to the widespread release of address information. Respondent presented no such evidence to the district court.<sup>9</sup> The California First Amendment Coalition advised the Legislature that “newspapers seldom print exact addresses nowadays.” Ct. App. Supp. Excerpts Rec. 382. Respondent and its six *amici* have identified only

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<sup>8</sup> For the same reason, this case is very different from *City of Cincinnati v. Discovery Network*, in which the government sought to restrict commercial newsracks, but not noncommercial newsracks, based solely on an asserted higher value for noncommercial speech. 507 US 410, 424 (1993) (restriction was invalid because it bore “no relationship *whatsoever* to the particular interests” asserted).

<sup>9</sup> Instead, the lower courts ruled based on the erroneous assumption, Pet. App. 11a (district court), 25a (court of appeals), which Respondent no longer defends as correct, that Section 6254 requires the release of arrest records for any purpose other than commercial speech, including curiosity seeking.

one California newspaper that publishes *any* arrestee addresses (the *Sacramento Bee*<sup>10</sup>) and *no* examples involving scholars, politicians, or private investigators, which is a far cry from the constant, *en masse*, and state-wide disclosure that Respondent demands here. The most that Respondent can say is that, under Section 6254, newspapers, scholars, and politicians “could” engage in the dissemination of address information, not that they actually *do* so, which is the relevant inquiry.<sup>11</sup> In reality, the marketplace makes Respondent a viable commercial enterprise precisely because it distributes arrestee address information on a different order of magnitude than any other type of recipient. Even if there is any doubt about this point, it is precisely the kind of determination that appropriately is left to the studied judgment of legislators, and there is ample record evidence supporting the judgments embodied by Section 6254. See Pet. Open. Br. 2-5.

This case accordingly cannot fairly be distinguished from *United States Department of Justice v. Reporter’s Committee for Freedom of the Press*, which approved the FBI’s policy of withholding criminal “rap sheets” even insofar as they contain information that “is a matter of public record.” 489 US 749, 757 (1989). This Court found that a privacy interest justified withholding rap sheets, notwithstanding that they (i) were “used in the preparation of press releases and publicity designed to assist in the apprehension of wanted fugitives,” and (ii) were released to (a) various banks, (b) state and local governments, (c) self-regulatory organizations in the securities

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<sup>10</sup> Contrary to Respondent’s claim, Resp. Br. 30 n.21, the *Fresno Bee* prints only the names (not addresses) of men and women arrested for prostitution offenses. Ct. App. Supp. Excerpts Rec. 479.

<sup>11</sup> Nor can Respondent even hypothesize circumstances in which the statute results in the public dissemination of crime victims’ addresses, but the logic of the ruling below would mandate that this information be provided to Respondent as well.



industry, and (d) licensees and applicants before the Nuclear Regulatory Commission. *Id.* at 752. Respondent attempts to distinguish *Reporter's Committee* only by quoting the Court's explanation that "plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information." *Id.* at 764. But the reasoning of *Reporter's Committee* is fully applicable here: there is an equally "vast difference" between the limited number of arrestee addresses that Respondent can gather through a "diligent search" of news reports and occasional scholarly publications and the *en masse* disclosures that Respondent receives absent a provision such as Section 6254. *See also id.* ("Indeed, if the summaries were 'freely available,' there would be no reason to invoke the FOIA to obtain access to the information they contain.").

Respondent's argument also relies on a mischaracterization of the state interests furthered by Section 6254. Respondent contends that the statutory exceptions that permit the release of addresses to journalists and scholars irrationally permit invasions of privacy. But Respondent ignores entirely the explanation in Petitioner's opening brief that Section 6254 is designed not to further individual privacy at the sacrifice of all other interests, but instead to balance individual privacy against the public benefits available from the targeted release of address information, including informing the public about crime.<sup>12</sup> California releases addresses to journalists, scholars,

<sup>12</sup> California's effort to balance these interests is clear from the history of Section 6254(f)(3), which Petitioner detailed in its opening brief, at 2-5, but which Respondent ignores. The State initially considered completely prohibiting the release of address information, but ultimately adopted certain exceptions (including for journalists and private investigators) as a more "tailored" remedy for the evils the state sought to prevent. Substantial record evidence was presented to the California legislature demonstrating that de-

and political advocates, whose protection is the First Amendment's core concern.<sup>13</sup> Respondent further ignores the fact that although the statute permits news outlets to publish lists of the names and addresses of some arrestees, every indication is that only a few do so, and even then only for more important, newsworthy crimes. Moreover, even if that were not correct, the state would retain legitimate interests in not participating in the for-profit dissemination of the addresses of arrestees and crime victims, and in not being perceived as facilitating such a business, particularly when it is the government that compels arrestees and crime victims to provide the personal information in question.

## II. The Historical Evidence Does Not Establish A First Amendment Right Of Public Access To Arrestee And Crime Victim Addresses.

Respondent contends that there is a First Amendment right of access to the information withheld under Section 6254, an argument that was squarely rejected below.<sup>14</sup> But, as in the

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mands for the release of address information had increased by 1200%, Ct. App. Supp. Excerpts Rec. 307, and that as a result arrestees frequently received from 12 to 16 solicitations each, *id.* 334, 361. Pet. Open. Br. 2-5. *Contra* Resp. Br. 5, 20 (claiming that "[n]o evidence in the record supports the existence of any 'solicitation invasion' problem" and that "Petitioner produced no evidence that any privacy invasion had existed before the statute's enactment").

<sup>13</sup> A prohibition on such exceptions would, ironically, give legislatures a substantial incentive to prohibit the release of address information altogether, which would only undermine the speech interests of journalists and scholars.

<sup>14</sup> In point of fact, Respondent principally argues that there is a common law right of access, Resp. Br. 36-37, leaving it to an *amicus* to address the asserted First Amendment right of access. Regarding Respondent's argument, any common law right of access has been supplanted by Section 6254.

lower courts, Respondent has failed to establish here that "the place and process have historically been open to the press and the general public." *Press-Enterprise Co. v. Superior Court*, 478 US 1, 8 (1986). In the first instance, this entire line of authority is limited to events – such as trials, preliminary hearings, and jury voir dres – rather than government records, which are neither a "place" nor a "process." In any event, it is telling that the historical tradition and right of access asserted by Respondent never have been recognized by any judge in any state or federal court or (to Petitioner's knowledge) identified in any of the scholarly literature regarding this nation's history.

Respondent first explains that in colonial times there was not uniformly an organized police force, such that law enforcement duties sometimes were handled by the citizenry. Br. of Investigative Reporters & Editors, Inc. as *Amicus Curiae* 8-12. If anything, this would prove only that the citizenry had access to address information insofar as it participated in "serving as constables during the day or watchmen during the night." Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 825 (1994). There is no evidence of a broader public right to, or interest in, address information. To the extent this early private law enforcement has a modern analogue, it is carried on by private investigators, who are provided address information under Section 6254.

Respondent also contends that in later periods arrestee addresses were published by the press. But this argument fails to prove Respondent's point, as Section 6254 itself grants the press access to address information and the question instead is whether there traditionally was a broader right of public access, including a right to use address information for profit. Respondent has produced no evidence that this was the case. Moreover, even the newspaper quotations invoked by Respondent are anecdotal and are a far cry from the tradition "throughout the United States" required by this Court's

precedents. *El Vocero De Puerto Rico v. Puerto Rico*, 508 US 147, 150 (1993) (per curiam). Respondent's examples also frequently are inapposite, as a majority do not contain addresses or do not involve arrests.<sup>15</sup> Nor is there any evidence at all regarding what sources provided the press with the information, including particularly whether the government regarded the press as possessing a right to review police blotters.

As a separate matter, Respondent has not established that "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co.*, *supra*, 478 US at 8. Section 6254 not only requires the uniform release of almost all information about crimes, crime victims, and arrestees, but also requires that newspapers and scholars have access to the victim's and arrestee's addresses. Respondent does not assert that the broader release of address information is necessary to serve any public interest, including to inform the public adequately about crime. Section 6254 thus provides for an informed public by mandating the uniform disclosure of almost all crime information (such as the date and type of each reported crime, the location of the crime, the name and description of the arrestee, and the name of the victim), but does not uniformly require that the state facilitate efforts by the general public and businesses such as Respondent to identify and to contact arrestees and crime victims. The Legislature determined that such widespread release of address information would constitute an unwarranted invasion of privacy.

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<sup>15</sup> E.g., Br. of Investigative Reporters & Editors, Inc. as *Amicus Curiae* 12-17 (examples of Esther M'Connell, William Kerr, and Zechariah Allen not involving addresses; examples of John Gosling, Simeon Belknap, John Jones, Thomas Walsh, and Selah Sheldon not involving arrest reports).



In addition, Respondent clearly seeks address information to profit, not to assist in the arrest process. As this Court explained in *Reporter's Committee*:

In this case -- and presumably in the typical case in which one private citizen is seeking information about another -- the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.

489 US at 749. In these circumstances, no right of access to government records arises.

### III. Respondent's Remaining Arguments Are Not Properly Presented In This Court.

Several of Respondent's remaining arguments are not properly presented to this Court because they rest on a misunderstanding of the holding below. The lower courts invalidated Section 6254 on its face and therefore never addressed the statute's application to Respondent's different uses of address information. See Pet. App. 22 (district court opinion declining to reach Respondent's remaining claims "[s]ince the Court finds Cal. Gov. Code § 6254(f)(3) unconstitutional as an impermissible limitation on commercial speech"); *id.* 36 (court of appeals opinion affirming "[h]aving concluded that § 6254(f)(3) violates *Central Hudson*"). The lower courts specifically had no cause to distinguish between Respondent's sales of addresses through an information service and its distribution of its publication, "The Register."

Respondent now contends that even if Section 6254 is valid as applied to Respondent's information service, the statute nonetheless is invalid as applied to "The Register."<sup>16</sup> That

<sup>16</sup> We note that Respondent did not raise this issue, which would seem to require modifying the lower courts' judgment that

issue, however, is not properly presented to this Court because Respondent may be entitled to acquire addresses for use in "The Register." Respondent's complaint sought a declaration that "The Register" fell within the statutory exceptions for journalism and scholarship,<sup>17</sup> but as noted, the lower courts never reached that question and specifically never made any factual findings about the nature of "The Register." Respondent acknowledges that it never has requested address information under the journalism and scholarship provisions. Resp. Br. 46 n.31.<sup>18</sup> Because neither the parties nor the Court know at this point whether Section 6254 permits Respondent to acquire address information for use in "The Register," this Court should not in the first instance adopt a potentially uninformed and unnecessary holding that the Constitution mandates access to records for that purpose.

Similarly, there is no basis for addressing, much less adopting, Respondent's assertion that the categories set out in Section 6254 (*i.e.*, journalism, scholarship, and politics) are unconstitutionally vague. These classifications are easily definable. *Cf.* 5 USC 552(a)(4)(ii)(II) (FOIA provision based on category of "representative of the news media"); 28 CFR 16.11(b)(6) (regulation further defining statutory category).

Section 6254 is invalid on its face, through a cross-petition for certiorari.

<sup>17</sup> Ct. App. Excerpts Rec. 334, ¶ 5 (requesting a declaration "that the publication of plaintiff, 'Register,' \* \* \* falls within the provisions of the Amendment"); see also *id.* 699, ¶ 4 (declaration submitted by Respondent asserting that "[i]t is United Reporting's intent that the 'JailMail' Register be informative, journalistic as well as scholarly").

<sup>18</sup> Respondent states that "United Reporting could not sign the declarations required by section 6254(f)(3) for fear of criminal liability," Resp. Br. 46 n.31, which Petitioner takes to mean only that Respondent also intended to sell addresses for a profit, which prohibits Respondent from receiving address information under the statute.



Any ambiguities exist only because this litigation resulted in a prompt injunction against enforcement of Section 6254 and therefore made it impossible for California's law enforcement agencies to address any questions regarding the statute's scope.<sup>19</sup> Certainly, this is not an instance in which it is appropriate for courts to intervene prior to the application of a statute, as when a law impermissibly has granted officials the unfettered discretion to apply a vague speech restriction or when the statute's mere existence chills expressive activity.

### CONCLUSION

For these reasons, as well as those set forth in Petitioner's opening brief, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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August 23, 1999

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<sup>19</sup> For example, the State never has had the opportunity to address whether reference services retained by journalists fall within the statute's journalism provision, a point that was first raised in the *amicus curiae* submissions in this Court.

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No. 98-678

**In the Supreme Court of the United States**

OCTOBER TERM, 1998

LOS ANGELES POLICE DEPARTMENT, PETITIONER

v.

UNITED REPORTING PUBLISHING CORPORATION

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER**

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### **QUESTION PRESENTED**

Whether the First Amendment prohibits California from providing that the personal addresses of crime victims and arrested suspects, collected and maintained in its law enforcement records, will be released to third parties only for certain specified purposes, and in particular only on the condition that the addresses "not be used directly or indirectly to sell a product or service."



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### INTEREST OF THE UNITED STATES

Federal law provides for public access to federal government records under a variety of circumstances. See, e.g., 5 U.S.C. 552 (1994 & Supp. III 1997) (Freedom of Information Act); 2 U.S.C. 438 (1994 & Supp. III 1997) (Federal Election Campaign Act of 1971); 5 U.S.C. App. 105 (1994 & Supp. III 1997) (Ethics in Government Act of 1978); 42 U.S.C. 1306 (Social Security Act); 5 C.F.R. 2634.603; 32 C.F.R. 84.21; 32 C.F.R. Pt. 1293, App. D; 45 C.F.R. 205.50; 45 C.F.R. 706.24; 47 C.F.R. 0.460. Each such provision places some restrictions on public access, and some contain "commercial purpose" restrictions similar to the one at issue in this case. See, e.g., 2 U.S.C. 438 (1994 & Supp. III 1997); 5 U.S.C. App.



105(c)(1). Federal law also restricts the conditions under which state authorities may release certain information, including names and addresses, for commercial or other purposes. 18 U.S.C. 2721 (Driver's Privacy Protection Act of 1994); 42 U.S.C. 1306a (Social Security Act); see *Reno v. Condon*, petition for cert. pending, No. 98-1464. The United States accordingly has a strong interest in the proper analysis of the validity of such restrictions under the First Amendment.

### STATEMENT

1. Before 1996, California law generally required each state and local law enforcement agency to "make public \* \* \* the full name, current address, and occupation of every individual arrested by the agency." Cal. Gov't Code § 6254(f) (West 1995). Effective July 1, 1996, the state legislature amended Section 6254(f) to permit release of the addresses of those arrested, and of crime victims, only where the requester declares, under penalty of perjury, both that "the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator," and that "[a]ddress information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals." § 6254(f)(3) (West Supp. 1999). These restrictions apply only to current address information; they do not affect the availability of other information, such as the name, birth date, occupation, and physical description of an arrested individual or the factual circumstances of the arrest. See § 6254(f)(1) (West Supp. 1999).

Petitioner Los Angeles Police Department creates and maintains arrest records, and makes them publicly available in accordance with state law. Pet. App. 25a. Respondent United Reporting Publishing Corporation is a private

service that seeks to provide its customers with periodic reports of the names and addresses of individuals recently arrested by petitioner and other California law enforcement agencies. *Ibid.* Respondents' patrons include attorneys, insurance companies, drug and alcohol counselors, religious counselors, and driving schools, which may use the addresses supplied by respondent "for many purposes, including sending free literature to arrestees offering legal, drug, and alcohol counseling, cost information, and [information on] statutory and regulatory deadlines and other information concerning the crimes charged." Br. in Opp. 5.

2. Respondent sued petitioner and others in federal district court seeking declaratory and injunctive relief under 42 U.S.C. 1983, contending that the restrictions California has placed on the release of address information from arrest and crime reports violate the First Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Pet. App. 25a-26a; see C.A. E.R. 1-9 (Complaint). The district court granted summary judgment in favor of respondent, holding that the State's restrictions violate the First Amendment. Pet. App. 10a-23a.

The district court recognized that "the First Amendment does not provide plaintiff with a blanket constitutional right of access to arrestee addresses," and that "the state could constitutionally prevent everyone from having access to this information." Pet. App. 14a. The court concluded, however, that by "mak[ing] all arrestee information public, but then limit[ing] access only [on the part of] those who plan to use arrestee addresses in commercial speech," the State has "[f]unctionally \* \* \* [imposed] a limitation on commercial speech." *Ibid.* In the court's view, because "[t]he government is the only source of this information and by statute is disseminating it to everyone except commercial users"

(*ibid.*), the State's restrictions amount to "a content-based indirect limitation on commercial speech which implicates the First Amendment" (*id.* at 16a). The court accordingly turned to the four-part test adopted by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), for use in analyzing restrictions on commercial speech. Pet. App. 16a-22a.

Applying that test, the court first noted that there was no contention that respondent's "proposed use of [address] information" would be misleading or unlawful. Pet. App. 16a. The court also accepted the substantiality of two pertinent governmental interests: mitigating the fiscal and administrative burden of processing information requests, and protecting recently arrested individuals from having the addresses they provided to the police used to subject them to commercial solicitation in their homes. *Id.* at 17a. The court rejected, however, the argument that the commercial-use restriction imposed by Section 6254(f)(3) would advance those interests in a "direct and material way." *Id.* at 18a; see *id.* at 17a-22a. For essentially the same reasons, the court also held that there was no "reasonable fit" between the State's asserted ends and the means it had chosen to accomplish them. *Id.* at 22a.

With respect to fiscal interests, the court thought it "doubtful" that the address restriction would save the government money, because agencies would still have to provide address information to authorized noncommercial users, and other information to all users. Pet. App. 18a. "The simple omission of addresses [for commercial requesters] will not minimize \* \* \* agency expenses." *Ibid.* With regard to the State's interest in "protecting the privacy and tranquility of its residents," the court recognized (*ibid.*) that in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 630 (1995), this Court upheld a prohibition on direct-mail solicitations by lawyers within 30 days of an accident, on the basis of the State's

interest in protecting "the personal privacy and tranquility of \* \* \* citizens from crass commercial intrusion by attorneys upon their personal grief in times of trauma." The district court distinguished *Florida Bar*, however, on the grounds that California's restriction on commercial use of addresses is "permanent," and that in this case an arrested person's interest in obtaining "immediate legal assistance \* \* \* so heavily outweighs any concern that arrestees may find such attorney solicitations offensive that the [privacy] justification borders on the disingenuous." Pet. App. 19a. The court found it "hard to see how direct mail solicitations invade the privacy of arrestees," who are free to throw them away, and it noted that Section 6254(f)(3) would allow "potentially much more pervasive invasions of privacy," such as having an arrested person's name and address "published in newspapers, broadcast on television, and/or obtained by an employer or even an enemy." *Id.* at 21a.

3. The court of appeals affirmed. Pet. App. 24a-36a.<sup>1</sup> After briefly discussing "the protection provided under the First Amendment to what has been commonly designated 'commercial' speech" (*id.* at 26a-27a), the court rejected (*id.* at 27a-29a) respondent's contention that "it uses arrestee [address] information to engage in fully-protected non-commercial speech, the regulation of which is subject to strict scrutiny" (*id.* at 27a). To the contrary, the court reasoned that respondent's "speech would be considered commercial under either a broad or a narrow definition," because respondent "sells arrestee information to clients; nothing more." *Id.* at 29a. The speech involved in that "pure economic transaction," the court concluded, is "entitled to only

<sup>1</sup> Although the Attorney General of California and a number of state law enforcement agencies were parties to the district court proceedings, only petitioner appealed from the district court's judgment. See Pet. App. 9a, 26a n.1; see also Pet. 2.



'a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values.'" *Id.* at 29a (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)).

Assessing California's restriction on the release of arrestee addresses under this Court's *Central Hudson* test (Pet. App. 29a-36a), the court of appeals agreed with the district court that "the speech at issue is neither illegal nor misleading" (*id.* at 30a) and that the State has a "substantial" interest in protecting the privacy of those who have been arrested, including their "ability to avoid intrusions" in their homes (*id.* at 31a).<sup>2</sup> The court also agreed, however, that the State's restriction "does not directly and materially advance the government's interest in protecting the privacy and tranquility of its residents." *Id.* at 32a; see *id.* at 34a.

The court first rejected petitioner's argument that restricting the release of addresses would "reduce[] the opportunity for commercial interests to create and maintain an unreliable criminal history information bank." Pet. App. 32a. Finding in the record on summary judgment "no evidence whatsoever" that commercial interests were likely to create such data banks, the court dismissed that potential harm as "no more than speculation and conjecture, which is insufficient to sustain a restriction on commercial speech." *Ibid.*

<sup>2</sup> The court held that petitioner had waived, on appeal, any challenge to the district court's holding that the State's restrictions on the release of address information did not directly and materially advance a governmental interest in controlling costs. The court therefore considered "the only [governmental] interest at issue" on appeal to be "the asserted governmental interest in protecting the privacy of arrestees." Pet. App. 30a-31a & n.3. (Note that the carryover paragraph at pages 30a-31a is misprinted as part of the text of the opinion; in the original, that language appears at the end of footnote 3.)

The court acknowledged that the State's interest in reducing "direct intrusion[s] into the private lives and homes of arrestees and victims" by declining to authorize release of their addresses for commercial purposes was "somewhat more weighty." Pet. App. 32a-33a. It concurred, however, in the district court's conclusion that "[t]he fact that journalists, academicians, curiosity seekers, and other noncommercial users may peruse and report on arrestee records \* \* \* belies [petitioner's] claim that the statute is actually intended to protect the privacy interests of arrestees." *Id.* at 33a. "Instead," the court observed, the State's restriction on disclosing addresses "appears to be more directed at preventing solicitation practices." *Ibid.* The court declined to accord that legislative goal great weight, both because it found it "hard to see how direct mail solicitations invade the privacy of arrestees," and because, the court reasoned, "the privacy of arrestees [is] not invaded by the solicitation itself, but by the solicitor's discovery of the information that led to the solicitation." *Ibid.*

Ultimately, the court concluded that "[t]he myriad of exceptions to § 6254(f)(3) precludes the statute from directly and materially advancing the government's purported privacy interest." Pet. App. 34a. The court relied heavily on *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), which struck down a federal prohibition on the disclosure of alcohol content on beer labels on the ground that the prohibition could not "directly and materially advance its aim" in view of "other provisions of the same act [that] directly undermine[d] and counteract[ed] its effects." Pet. App. 34a-35a (quoting *Coors*, 514 U.S. at 489). Citing *Coors* and its own decision in *Valley Broadcasting Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 118 S. Ct. 1050 (1998), which invalidated a federal ban on broadcast advertisements for casino gambling "in light of the numerous exceptions to the ban" (Pet. App. 35a), the court of appeals felt "compelled



to hold that the numerous exceptions to § 6254(f)(3) for journalistic, scholarly, political, governmental, and investigative purposes render the statute unconstitutional under the First Amendment." *Ibid.*<sup>3</sup> Believing that "[h]aving one's name, crime, and address printed in the local paper is a far greater affront to privacy than receiving a letter from an attorney, substance abuse counselor, or driving school eager to help one overcome [one's] present difficulties (for a fee, naturally)," the court concluded that "[t]he exceptions to § 6254(f)(3) 'undermine and counteract' the asserted governmental interest in preserving privacy just as surely as did the exceptions in *Coors Brewing* and *Valley Broadcasting*." *Id.* at 35a-36a. The court accordingly affirmed the district court's judgment invalidating California's restriction on the release of arrestee addresses for commercial purposes as "an unconstitutional infringement of [respondent's] First Amendment rights." *Id.* at 36a.<sup>4</sup>

#### SUMMARY OF ARGUMENT

The First Amendment forbids enactment of any law "abridging the freedom of speech, or of the press." U.S. Const. Amend. I. The freedoms it guarantees do not, however, include any general right to compel the public release of information contained in government records, and there is nothing to support recognition of any special right of access in this case. To the contrary, California's balancing of privacy and other interests in determining under what circumstances to authorize release of personal address informa-

<sup>3</sup> The constitutionality of the advertising ban struck down in *Valley Broadcasting* is presently before this Court in *Greater New Orleans Broadcasting Ass'n v. United States*, No. 98-387 (argued Apr. 27, 1999).

<sup>4</sup> In light of its holding that Section 6254(f)(3) failed the "direct advancement" component of the *Central Hudson* test, the court did not consider either the final prong of that test or respondent's separate equal protection and due process claims. Pet. App. 36a nn.5-6.

tion from arrest and crime records is exactly the sort of public policy decision that should be resolved by the political branches of government.

The lower courts viewed California's decision to make address information available for journalistic, scholarly, and other specified purposes, but not for purposes of commercial solicitation, as an indirect limitation on respondent's commercial speech. They accordingly analyzed the constitutionality of California's rule under the test articulated by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). This Court has applied the *Central Hudson* test, however, only in cases involving direct prohibitions on speech. This case involves no such prohibition; and the fact that respondent and its customers may find it more difficult or expensive to obtain addresses if the government does not make that information available imposes no greater burden on their right to speak than is imposed on any speaker by the fact that it may cost money to find and reach an audience. There is accordingly no reason to review California's disclosure rules under *Central Hudson*.

The State's decisions about the uses for which information in public records should or should not be released are instead properly analyzed under principles this Court has developed in reviewing legislative decisions regarding the expenditure of public funds—a context in which a government has wide latitude to support or facilitate only activities that it considers to be in the public interest. This case involves no question of distinctions based on viewpoint; and the legislative decisions embodied in the State's disclosure rules reflect reasonable accommodations between the public interests that may be served by disclosure in various contexts, and the State's interest in protecting the individuals involved against unwarranted incremental invasions of their privacy. Thus, for example, the State's willingness to re-

lease address information requested for journalistic or political purposes serves the public interest in open and informed debate about governmental functions that lies at the very heart of the First Amendment. On the other hand, its decision not to make addresses available for purposes of private commercial solicitation serves personal privacy interests of a sort that, as this Court has previously recognized, the State has a legitimate interest in protecting.

There is little support for the court of appeals' conclusion that the State's willingness to make address information available for some purposes makes it impossible for a prohibition on disclosure for other uses to serve any state interest in protecting privacy. To the contrary, California's Legislature could reasonably conclude that the balance of privacy costs and countervailing public benefits favored disclosure in the circumstances specified by Section 6254(f)(3), but not disclosure for private commercial use. Rejecting that legislative balancing of interests as unconstitutional would require the State to adopt disclosure rules *less* protective of core First Amendment values in order to prevent commercial exploitation of personal information gathered through its official processes.

### ARGUMENT

#### **CALIFORNIA'S REFUSAL TO DISCLOSE, FOR COMMERCIAL USE, HOME ADDRESSES OF PERSONS WHOM ITS OFFICERS HAVE ARRESTED, OR WHO HAVE BEEN THE VICTIMS OF CRIMES, DOES NOT VIOLATE THE FIRST AMENDMENT**

##### **A. Freedom Of Speech Does Not Imply A General Constitutional Right Of Access To The Government Records At Issue In This Case**

In Section 6254(f) of its Government Code, California has provided that certain information gathered by its law enforcement officers in the course of their duties—including

the names of persons arrested, the names of crime victims, and the circumstances of reported crimes and arrests—may be made available to any member of the public. Cal. Gov't Code § 6254(f)(1)-(2) (West Supp. 1999). The State has further provided, however, that the current address of a crime victim or arrested person will be disclosed only for "scholarly, journalistic, political, or governmental purpose[s]" or to a licensed private investigator, and only on the condition that the address "not be used directly or indirectly to sell a product or service." § 6254(f)(3) (West Supp. 1999). Nothing in the First Amendment requires the State to make such information from its files available at all, much less for commercial use.<sup>5</sup>

The First Amendment forbids enactment of any law "abridging the freedom of speech, or of the press." U.S. Const. Amend. I.<sup>6</sup> There is, however, an elementary distinction between an attempt to use governmental authority to prohibit or penalize speech, and a decision not to make available information in the possession of the government that a would-be speaker does not presently possess, but would like to obtain and then use in dealing or communicating with others.

<sup>5</sup> Respondent's complaint alleges that Section 6254(f)(3) applies to bar respondent's access to address information, and challenges the law's restrictions as facially invalid under the federal Constitution. See C.A. E.R. 5-6. The courts below accepted respondent's premise (see Pet. App. 14a, 28a-29a), as does the question presented in the petition. Pet. i. As presented to this Court, therefore, this case involves no question concerning the specific nature of respondent's activities, and there is no history of application or construction of the law by relevant state administrative or judicial authorities.

<sup>6</sup> The strictures of the First Amendment apply to state governments by operation of the Fourteenth Amendment. See, e.g., *Bridges v. California*, 314 U.S. 252, 267-268 (1941).



The First Amendment does not generally "mandate[] a right of access to government information or sources of information within the government's control." *Houchins v. KQED, Inc.*, 438 U.S. 1, 15-16 (1978) (plurality opinion) (no right to inspect areas of county prison not otherwise open to the public); see *id.* at 8-16 (plurality opinion); *id.* at 16 (Stewart, J., concurring in the judgment) ("The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government."); Pet. App. 13a ("The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.") (quoting Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631, 636 (1975)); cf. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (noting that party that obtained information through discovery in civil lawsuit had "no First Amendment right of access to information made available only for purposes of trying [its] suit"). To the contrary, although a limited, non-constitutional common law of access to public records has been recognized in some circumstances, see generally *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-608 (1978), the area is one in which public policy has traditionally been set through general or specific disclosure statutes embodying considered legislative judgments about what information should be released from government records, to whom, and for what purposes. See, e.g., Freedom of Information Act (FOIA), 5 U.S.C. 552 (1994 & Supp. III 1997); Privacy Act of 1974, 5 U.S.C. 552a (1994 & Supp. III 1997); Presidential Records Act of 1978, 44 U.S.C. 2201 *et seq.*; *United States Dep't of Defense v. FLRA*, 510 U.S. 487 (1994) (discussing interrelationship of FOIA, the Privacy Act, and the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.*, in the context of a union request for the home addresses of government employees); *United States Dep't of State v. Ray*, 502 U.S. 164, 173-179 (1991) (release of certain interview reports without redaction

of identifying information would constitute a "clearly unwarranted invasion of personal privacy" under FOIA); *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (same with respect to FBI "rap sheets"); *Department of the Air Force v. Rose*, 425 U.S. 352, 355, 378-382 (1976) (ordering disclosure, under FOIA, of "case summaries of [Air Force Academy] honor and ethics hearings, [but] with personal references or other identifying information deleted").

The proposition that there is no constitutional right of access to government information or proceedings is not unqualified. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603-610 (1982) (public access to criminal trials).<sup>7</sup> Nor has it been entirely uncontroversial. See, e.g., *Houchins*, 438 U.S. at 19, 27-38 (Stevens, J., dissenting); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 582-584 (1980) (Stevens, J., concurring); *id.* at 584-589 (Brennan, J., concurring in the judgment). This case does not, however,

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<sup>7</sup> The Court has recognized a qualified constitutional right of access to judicial proceedings that have traditionally been held in public, with a concomitant or alternative right of access to records of those proceedings. See, e.g., *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (access to voir dire proceedings or records thereof, subject to court's ability to protect privacy of potential jurors through properly justified and tailored orders); *Globe Newspaper Co.*, 457 U.S. at 603-610 (criminal trials); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (same) (plurality opinion); see also *id.* at 599 (Stewart, J., concurring in the judgment) ("[I]t has for centuries been a basic presupposition of the Anglo-American legal system that trials shall be public trials. \* \* \* With us, a trial is by very definition a proceeding open to the press and to the public."); but see *Nixon v. Warner Communications*, 435 U.S. at 608-610 (no First or Sixth Amendment right of access to physical copies of tape recordings played at trial); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (no constitutional right of access to pretrial proceedings, where trial judge concluded that closure was necessary to protect defendant's right to fair trial, and transcript was subsequently made available).



test any possible outer limits of the principle. Even proponents of a constitutional right to compel disclosure under certain circumstances have agreed that any such right, because its "stretch \* \* \* is theoretically endless," \* \* \* must be invoked with discrimination and temperance," taking into account the structural reasons for recognizing the right, and the particular nature of "the information sought and the opposing interests invaded" in any given situation. *Id.* at 588 (Brennan, J., concurring in the judgment) (citation omitted). That analysis would not support recognition of a right of access in this case, because California's decision not to release personal address information, contained in its arrest and crime records, for purposes of private commercial solicitation poses no threat to the fundamental structural interest in "securing and fostering our republican system of self-government." *Id.* at 587 (Brennan, J., concurring in the judgment). It is, to the contrary, a good example of exactly the sort of routine disclosure decision that "involve[s] questions of policy which generally must be resolved by the political branches of government." *Houchins*, 438 U.S. at 34 (Stevens, J., dissenting).

**B. This Case Does Not Involve A Government Restraint On Commercial Speech**

The district court specifically recognized (Pet. App. 12a-14a), and the court of appeals did not question, that there is no general constitutional right of access to the address information that California has declined to provide to respondent. Both courts focused, however, on the fact that California's disclosure law makes the address of an arrested person available (along with other information about the arrest) to persons who request it for certain specified purposes, while denying access to the address (although not to any of the other information) to "those who plan to use

arrestee addresses in commercial speech." *Id.* at 14a; see *id.* at 14a-16a, 20a-21a, 27a-29a, 33a-36a. In the courts' view, that differential provision of access to address information, based on its intended use by the requester, amounts to "an indirect limitation on [the requester's] commercial speech." *Id.* at 14a. Both courts therefore analyzed the State's disclosure restriction under the test articulated by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), for "the constitutionality of government regulations limiting commercial speech." Pet. App. 29a.

The State's restriction on disclosure is, of course, directed in part at preventing the commercial use of addresses obtained from the State's arrest records and crime reports. See Cal. Gov't Code § 6254(f)(3) (West Supp. 1999) (prohibiting use of disclosed addresses "directly or indirectly to sell a product or service"). The restriction is not, however, appropriately viewed, for First Amendment purposes, as a restriction or burden on respondent's speech.

Addresses from arrest records are valuable to respondent (and its clients) not primarily because of their own intrinsic speech value—any fact or idea that they themselves convey—but rather because they can be used to find a particular target audience that respondent's clients want to contact. The State's non-disclosure rule is designed in large part to prevent that instrumental use of addresses from its files.<sup>8</sup> It may well be that respondent (and therefore its customers) will be able to secure equivalent address information only at greater cost, or in some cases not at all, if a state or local law

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<sup>8</sup> The State's rule presumably would also prevent disclosure of address information for the purpose of inclusion in a commercial database, where its value might lie in linking the fact of arrest (or of being a crime victim) to a personal record that might be sought by, for example, prospective employers, lenders, or insurers.

enforcement agency does not make it available to them. The fact remains, however, that California's decision to make addresses from its law enforcement files available for some purposes but not for others "impose[s] no restraint on the freedom of any [person or business] to communicate any message to any audience." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469 (1997); see also *Regan v. Taxation With Representation*, 461 U.S. 540, 546 (1983) (conditioning tax-deductibility of contributions on organization's refraining from lobbying does not involve "regulat[ion of] any First Amendment activity"); *FEC v. International Funding Inst., Inc.*, 969 F.2d 1110, 1113-1114 (D.C. Cir.) (en banc) (federal law requiring disclosure of political contributor lists but forbidding others to use those lists to solicit contributions or for commercial purposes "cannot be said in any sensible way to infringe upon the defendants' first amendment right to solicit contributions"), cert. denied, 506 U.S. 1001 (1992); *id.* at 1118-1119 (R.B. Ginsburg, J., concurring) (same statute cannot "credibly" be portrayed "as one that impels [potential users] \* \* \* to desist from" their own First Amendment activity). That respondent and its customers will, in the absence of disclosure by the government, have to find other sources for the addresses of persons to whom they would like to direct their solicitations imposes no more of a burden on their First Amendment rights than does the fact that they will have to buy the envelopes and pay the postage. Compare *Regan*, 461 U.S. at 549-550 ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right."); *International Funding Inst.*, 969 F.2d at 1113 (prohibiting use of disclosed information does not "impose any new burden upon" prospective user, but "simply leaves undisturbed a pre-existing barrier").

This Court's cases applying the *Central Hudson* test have all involved government rules that directly prohibited cer-

tain kinds of speech. See, e.g., *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (price advertising); *Edenfield v. Fane*, 507 U.S. 761 (1993) (in-person solicitation); *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (targeted direct-mail advertising); *Central Hudson, supra* (advertising promoting use of electricity); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (price advertising); compare *Wileman Bros.*, 521 U.S. at 469 & n.12 (distinguishing these cases on same ground). A similar analysis might be applied to material penalties imposed on speech—an unusual tax imposed only on particular sorts of advertising, for example, or the withdrawal of an otherwise available government benefit (such as a business license) on the ground that the speaker had engaged in some disfavored form of speech, or refused to endorse a government-favored position. Compare, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Speiser v. Randall*, 357 U.S. 513 (1958). This case, however, involves something quite different: a legislative decision that information developed and possessed by the government itself should not be made freely available for merely commercial use, whether or not that use includes speech. There is no warrant for subjecting that legislative decision about the appropriate uses of information compiled on public authority, at public expense, and for public purposes, to the sort of searching review that the Court has previously applied only to direct governmental restrictions on private speech. Compare *NEA v. Finley*, 118 S. Ct. 2168, 2179 (1998) (quoting *Maher v. Roe*, 432 U.S. 464, 475 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.")); *Regan*, 461 U.S. at 545-546 (distinguishing "penalty" cases in the context of a government choice to support some activities but not others).



**C. California's Decision To Make Personal Address Information That Was Gathered Through Public Processes Available For Limited Purposes, But Not For Commercial Use, Does Not Violate The First Amendment**

As noted above (see page 15, *supra*), the courts below believed that California's non-disclosure rule was subject to scrutiny under the *Central Hudson* test because it amounted to a content-based discrimination against commercial speech. See also, e.g., *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1511-1513 (10th Cir. 1994) (adopting same threshold analysis, although upholding restriction at issue). As we have explained, however, although California's disclosure rules no doubt make it more difficult for respondent and its clients to ascertain the addresses of members of their target audience, that incidental effect does not amount to a governmental restraint on commercial speech. The State's decisions about the uses for which information in public records should or should not be released are instead properly analyzed under principles this Court has developed in reviewing decisions by a legislature regarding the expenditure of public funds. In that context, it is clear that a government has "wide latitude" to support or facilitate only activities that it considers to be in the public interest. See *NEA v. Finley*, 118 S. Ct. at 2178-2179; *Regan*, 461 U.S. at 548 (heightened scrutiny does not apply "whenever Congress subsidizes some speech, but not all speech"); *Rust v. Sullivan*, 500 U.S. 173, 192-200 (1991); *Maher v. Roe*, *supra*; *International Funding Inst.*, 969 F.2d at 1115 (rejecting, in context of constitutional challenge to prohibition against use of disclosed information for solicitation or commercial purposes, the argument that "if the Government facilitates some type of speech, then its decision not to facilitate another, related type of speech is subject to strict scrutiny").

Even in subsidy or facilitation cases, this Court has cautioned that "the Government may not 'ai[m] at the suppression of dangerous ideas.'" *NEA v. Finley*, 118 S. Ct. at 2178 (quoting *Regan*, 461 U.S. at 548); see also *International Funding Inst.*, 969 F.2d at 1118-1119 (R.B. Ginsburg, J., concurring). In *NEA*, for example, the Court observed that "[i]f the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case," and that "if a subsidy were 'manipulated' to have a 'coercive effect,' then relief could be appropriate." 118 S. Ct. at 2178 (quoting *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting)). This case, however, raises no such concern.

California has not provided for release of address information for some journalistic purposes but not others, or for some commercial purposes but not others, based on the viewpoint of the requester—much less done so in a manner that seeks to "leverage" its control over the information in law enforcement files so as to have a coercive effect on private speakers. The State has not provided that addresses may be released to members of one political party but not others, or to scholars who support the police but not others, or otherwise endeavored, through its address disclosure restrictions, to favor or disfavor any idea. It permits disclosure to anyone who requests address information for one of the authorized purposes, and it forbids anyone to whom it discloses addresses to use them to sell any "product or service to any individual or group," without regard to the speech content of the product or service in question or the viewpoint of the requester. Cal. Gov't Code § 6254(f)(3) (West Supp. 1999); see *International Funding Inst.*, 969 F.2d at 1118 (R.B. Ginsburg, J., concurring) (federal election law restriction on use of disclosed contributor lists for



solicitation or commercial purposes “does not differentiate on the basis of the solicitor’s *viewpoint*”).<sup>9</sup>

Of course, distinctions drawn by government rules regarding the release of information must also, like other laws, be rationally related to the pursuit of legitimate governmental purposes, whether those rules are tested under the First Amendment or under equal protection principles. See, e.g., *Regan*, 461 U.S. at 546-551 (discussing both); cf. *United States v. Kokinda*, 497 U.S. 720, 733 (1990) (claim that one form of speech has been treated differently from others “is more properly addressed under the equal protection component of the Fifth Amendment”).<sup>10</sup> Indeed, the court of

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<sup>9</sup> The Court struck down a legislative distinction between commercial and non-commercial speech in *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), which involved a city ordinance that permitted distribution of newspapers through sidewalk newsracks, but prohibited similar distribution of “commercial handbills.” See *id.* at 412-415. That case is inapposite here, because unlike this one it involved a direct restraint on a particular mode of speech in spaces freely open to the public. In any event, *Discovery Network*’s “narrow” holding reflected the Court’s conclusion that the city’s distinction between commercial and non-commercial publications bore “no relationship *whatsoever* to the particular interests that the city ha[d] asserted,” and rested on no more than a “bare assertion that the ‘low value’ of commercial speech [was] a sufficient justification for [a] selective and categorical ban.” *Id.* at 424, 428; see also *id.* at 429-430. As we explain below, California’s differentiation between commercial solicitation and scholarly, journalistic, and other permitted uses rests on reasonable legislative judgments about the public interest in facilitating those different uses and the risks of harm that each of them might pose.

<sup>10</sup> Neither court below reached respondent’s equal protection claim, Pet. App. 22a, 36a n.6, although each court’s decision ultimately turned on the conclusion that Section 6254(f)(3) subjects respondent to unjustifiably disparate treatment. Accordingly, if this Court rejects (as it should) the lower courts’ First Amendment analysis, it might be appropriate to vacate the judgment below and to remand the case to give respondent the opportunity to pursue any remaining equal protection claim. On the other hand, the Court’s analysis of the reasonableness of California’s rules for

appeals’ decision in this case ultimately turned on the court’s conclusion that the State’s decision not to permit disclosure of addresses from its arrest and crime reports for commercial purposes was not a “rational” way to serve the State’s concededly important interest in protecting personal privacy, in view of the State’s willingness to disclose the same information for “journalistic, scholarly, political, governmental, and investigative purposes.” Pet. App. 35a. That is incorrect.<sup>11</sup>

The disclosure rules set out in Section 6254(f)(3) appear, indeed, to be designed to preserve public access to address information from arrest and crime reports to the extent that such access is likely to serve public interests, including the interest in informed debate about government operations that lies at the heart of the First Amendment. With the exception of addresses of victims of certain specified crimes (such as rape and other sexual assaults, child or spousal

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First Amendment purposes may foreclose any facial equal protection challenge.

<sup>11</sup> The court of appeals relied heavily (Pet. App. 34a-35a) on this Court’s decision in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), which invalidated a federal statute that prohibited brewers from including information about alcohol content on their product labels. Like *Discovery Network* (see note 9, *supra*), *Coors* involved direct regulation of commercial speech—in that case through a “unique and puzzling regulatory framework” of different rules governing the labeling and advertising of alcoholic beverages. 514 U.S. at 489. Applying heightened scrutiny under *Central Hudson*, the Court found the complex of rules in question to be “irrational[]” when considered as a whole. *Ibid.*; see *id.* at 488-490. This case, by contrast, does not involve a direct regulation of speech, and the state disclosure scheme at issue differentiates, in a limited regard, between certain non-commercial uses of address information from public records and any use of that information for the purpose of “sell[ing] a product or service.” That distinction was not at issue in *Coors*; and, as we explain below, the legislative decisions reflected in the California scheme are reasonable, both individually and taken as a whole.

abuse, stalking, and hate crimes), which are to be kept completely confidential, the law requires that addresses be disclosed, on request, not only for governmental purposes, but also for scholarly or journalistic purposes. Those provisions ensure that address information will be available in aid of any inquiry undertaken with a view to monitoring or evaluating government performance. Compare *United States Dep't of Defense*, 510 U.S. at 497 (In deciding whether release of information would be an "unwarranted invasion of personal privacy" under FOIA exemption, "the only relevant public interest in the FOIA balancing analysis" is "the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'").

California's provision for disclosure of addresses for "political" purposes, while seemingly unlikely to be frequently invoked, further ensures that addresses will be available whenever necessary to inform political debate—the preeminent First Amendment value. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-271 (1964). Finally, a provision concerning licensed private investigators allows for access in a presumably limited number of cases in which address information is germane to a legitimate, specifically focused private investigation. In all of those situations, California's Legislature has determined that the State's interest in making information gathered by public authorities available for public purposes outweighs its interest in protecting a crime victim's or arrested person's residual privacy interest in that specific address information.

The State has struck a different balance with respect to requests for address information for private commercial purposes—or for any other purpose not listed in Section 6254(f)(3), such as casual inquiries from members of the public. In those circumstances, the California Legislature

evidently concluded that any interests served by free disclosure were outweighed by personal privacy concerns. Compare *Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997) (FOIA requester's interest in obtaining Bureau of Land Management mailing list in order to provide recipients of BLM newsletter with additional information is not a public interest weighing in favor of disclosure under FOIA privacy exemption). That judgment is a reasonable one, and it is entitled to considerable judicial deference.

The addresses at issue in this case are personal information of a sort that this Court has previously recognized as affected with a substantial personal privacy interest, which the State may legitimately seek to protect. See *United States Dep't of Defense*, 510 U.S. at 500-501 (government employees' interest in nondisclosure of home addresses outweighs any interest in disclosure cognizable under FOIA); cf. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 626-632 (1995) (state interest in protecting citizens from intrusion of direct-mail offers to provide legal services shortly after accident or disaster). The addresses in state arrest and crime records were gathered by public authorities, often upon official demand, for the public purpose of investigating and punishing violations of the criminal law. Cf. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 32-33 (noting, in upholding protective order against publication, that newspaper had obtained the information in question "only by virtue of the trial court's [compulsory] discovery processes").<sup>12</sup> As we have explained

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<sup>12</sup> Address information in arrest records will have been provided under the obvious compulsion of the arrest itself, or independently generated by government officers during the course of an investigation. See *Pennsylvania v. Muniz*, 496 U.S. 582, 600-602 (1990) (discussing request for address as part of routine booking process). Addresses of crime victims will have been collected either as required by law, or as a practical condition of the victim's invoking society's largely exclusive public mechanisms for the investigation and punishment of crime.



(see pages 21-22, *supra*), the purposes for which California has authorized disclosure are all ones that the state legislature could reasonably have concluded serve important public interests—including the interests most centrally protected by the First Amendment—and therefore warrant release of address information, even at some incremental cost to personal privacy.

By contrast, private commercial use of addresses “to sell a product or service,” Cal. Gov’t Code § 6254(f)(3) (West Supp. 1999), is far less likely to serve any *public* purpose. Cf. *Reporters Comm.*, 489 U.S. at 766 n.18, 771-775 (recognizing different public and private interests in disclosure of information from government files). Such use would, however, be much more likely to include or facilitate private commercial solicitation, in person or by mail or telephone, of the individuals involved. Those individuals would very likely surmise, accurately, that their addresses had been made available for that purpose by state authorities. California’s lawmakers could reasonably conclude that some citizens would find such solicitation intrusive, and would consider it an unwarranted *incremental* invasion of their privacy for the State to have disclosed to the solicitors personal information that it had obtained from them only on compulsion, or at least for serious public purposes. Compare *Florida Bar*, 515 U.S. at 626-630 (recognizing intrusive and potentially offensive nature of mail solicitations under some circumstances); *United States Dep’t of Defense*, 510 U.S. at 500-501 (“[W]hen we consider that other parties, such as commercial advertisers and solicitors, must [under FOIA] have the same access \* \* \* to the employee address lists sought in this case, \* \* \* it is clear that the individual privacy interest that would be protected by nondisclosure is far from insignificant.”); *Reporters Comm.*, 489 U.S. at 762-771 (recognizing substantial interest in avoiding incremental invasions of privacy, even where the same information is in some

respects “public”); *Lanphere*, 21 F.3d at 1514 (identifying “maintaining public confidence in our system of justice” as a state interest supporting prohibition on commercial use of addresses from state records). Moreover, the court of appeals improperly denigrated the State’s expressed concern with the private use of address information from crime and arrest records in commercial databases, which indeed raise well recognized (and growing) privacy concerns. Compare Pet. App. 32a (dismissing petitioner’s concern over privacy implications of commercial data banks as “no more than speculation and conjecture”) with, *e.g.*, *Reporters Comm.*, 489 U.S. at 766 (recognizing that federal Privacy Act “was passed largely out of concern over ‘the impact of computer data banks on individual privacy’”); *id.* at 760, 764, 766-767, 769-771 (recognizing special privacy concerns created by computer data banks); cf. *Florida Bar*, 515 U.S. at 629-630 (criticizing treatment of privacy concerns in prior decision as “casual” and “perfunctory”).

The court of appeals concluded that, although protection of personal privacy was an important governmental interest, it was “not rational for a statute which purports to advance the governmental interest in protecting the privacy of arrestees to allow the names and addresses of the same to be published in any newspaper, article, or magazine in the country.” Pet. App. 35a. That argument, however, misconstrues the nature of the government’s interest, which involves not protecting the secrecy of government information, but avoiding facilitation by the government of unwarranted invasions of personal privacy. Compare *id.* at 33a (discussing when violation of privacy interest occurs). As the term “unwarranted” implies, the State pursues that interest not as an absolute, but by seeking to limit the types of intrusions that the government itself will facilitate to those that can be justified by what the State views as legitimate public interests.



The court of appeals' assessment also relied on a speculative characterization of the likely result of disclosures authorized by California's rules. The court adduced no evidence, for example, that journalists seek personal address information from any substantial portion of the State's arrest or crime records; that, when they do so, they normally publish that information; or that any such publication normally results in an objective or perceived invasion of privacy comparable to having one's home address included on one or more lists and then being contacted, in person or by mail, by commercial solicitors. It seems at least as likely that members of the press might routinely review general arrest information, but would request addresses only in cases of particular public interest—and then often only for purposes of contacting an individual themselves. "Scholarly" requests for individual addresses would seem even more likely to be sporadic, and even less likely to result in substantial invasions of privacy.<sup>13</sup> Disclosures for "political" or private investigatory purposes (*ibid.*) similarly seem unlikely to be frequent; and while they might be disclosures that the persons affected would prefer not to occur, the State could properly conclude that in such cases the countervailing public interest in disclosure would be strong.<sup>14</sup>

<sup>13</sup> While scholars might sometimes contact individuals whose addresses they had obtained, they might also request address information solely for statistical purposes, which would involve no material invasion of individual privacy interests.

<sup>14</sup> Cf. *Reporters Comm.*, 489 U.S. at 761 (quoting *Reporters Comm. for Freedom of the Press v. United States Dep't of Justice*, 831 F.2d 1124, 1129 (D.C. Cir. 1987) (Starr, J., dissenting) ("Although there may be no public interest in disclosure of the FBI rap sheet of one's otherwise inconspicuously anonymous next-door neighbor, there may be a significant public interest—one that overcomes the substantial privacy interest at stake—in the rap sheet of a public figure or an official holding high government office."), *rev'd*, 489 U.S. 749 (1989)).

There is, therefore, little to support the court of appeals' apparent conclusion (Pet. App. 35a) that the "numerous exceptions" set out in Section 6254(f)(3) would make it impossible for the general rule of non-disclosure—and, in particular, the rule that addresses may not be disclosed or used for commercial purposes—to serve any state interest in protecting privacy. To the contrary, it is by no means clear that the privacy "cost" of the statutory exceptions would be substantial, or even material, in the great majority of cases, particularly considered in relation to the countervailing public interests to be served by disclosure. The privacy cost of disclosure for commercial purposes, on the other hand, is plain, as is the lack of any substantial public interest to justify incurring it. So, at any rate, California's Legislature was entitled to conclude; and nothing in the First Amendment precludes the State from adopting an information-disclosure policy based on those conclusions. Indeed, any contrary holding would require the State, in order to prevent commercial exploitation of personal information gathered through its official processes, to adopt non-disclosure rules that would be significantly *less* protective of core First Amendment values. Cf. *Kokinda*, 497 U.S. at 733 ("The dissent would create, in the name of the First Amendment, a disincentive for the Government to dedicate its property to any speech activities at all."). That would be a perverse and unwarranted result.<sup>15</sup>

<sup>15</sup> A governmental decision not to provide *any* information about some or all arrests might raise different concerns, particularly if (as seems likely) there proved to be some historical tradition of making public at least some information about the exercise of that core government power. See generally note 7, *supra*. This case raises no such issue, because California continues to provide full public access to detailed information on every arrest and crime report—all information, indeed, except the "current address" of the crime victim or person arrested. See Cal. Gov't Code § 6254(f) (West Supp. 1999).

**CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE  
**Supreme Court of the United States**  
**October Term 1998**

LOS ANGELES POLICE DEPARTMENT,

*Petitioner,*

-v.-

UNITED REPORTING PUBLISHING CORP.,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF THE STATES OF NEW YORK *et al.***  
**AS AMICI CURIAE IN SUPPORT OF PETITIONER**

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**QUESTION PRESENTED**

Whether the government violates the First Amendment when it refuses to release records for commercial use.

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No. 98-678

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**IN THE  
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**BRIEF OF THE STATES OF NEW YORK *ET AL.*  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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Pursuant to Sup. Ct. R. 37, the signatory States respectfully  
submit this brief as *amici curiae* in support of petitioner.



### INTEREST OF AMICI CURIAE

The States have a significant interest in the question this case presents. At issue is the validity, under the First Amendment, of a California statute prohibiting access to and use of personal address information contained in police reports when the information is sought "to sell a product or service." Each of the many States that limit access to or use of government information by commercial concerns has an interest in the determination whether such a limitation comports with the First Amendment when the records at issue are otherwise available for public inspection.

As catalogued in the appendix to the petition for certiorari, many States have such statutes. Some States, in their general freedom of information or open records statutes, restrict access to or use of personal information contained in public records by commercial interests. New York, for example, includes as "[a]n unwarranted invasion of personal privacy" not subject to disclosure any "lists of names and addresses if such lists would be used for commercial or fund-raising purposes." N.Y. Pub. Off. Law § 89 (McKinney 1998). At least six other States have similar provisions. *See, e.g.*, Md. Code Ann., State Gov't § 9-1015 (1997) ("[a]n individual may not request" records "for the purpose of commercial solicitation"); R.I. Gen. Laws § 38-2-6 (1997) (no "use" of "information obtained from public records ... to solicit for commercial purposes").

Other States place restrictions on access to or use of particular types of records. Most clearly concerned with the present case are the seven States with statutes that either deny would-be commercial users access to police reports, *see, e.g.*, Colo. Rev. Stat. § 24-72-305.5 (1997) (denying "access" to those who would use information in police reports "for the direct solicitation of business"), or prohibit use of the information in these reports for "commercial solicitation," *see, e.g.*, Fla. Stat. ch.

119.105 (1998). Closely related to such statutes are the eight State laws placing similar restrictions on access to or use of accident reports. *See, e.g.*, S.C. Code Ann. § 56-5-1275 (Law. Co-op. 1997) (those whose "intended use" is "for commercial solicitation purposes" may not "examine" reports); Haw. Rev. Stat. § 286-172 (Michie 1997) (information in reports may not be "used ... for the purposes of any commercial solicitation"). In addition, six States restrict disclosure of motor vehicle records for commercial purposes, *see, e.g.*, Ark. Code Ann. § 27-14-412 (Michie 1997) ("[m]otor vehicle registration information shall not be sold, furnished, or used for commercial solicitation purposes"); eleven States prohibit use of public assistance records for such purposes, *see, e.g.*, Mich. Stat. Ann. § 16.464 (Law. Co-op. 1997) (prohibiting use of information regarding applicants for or recipients of public assistance "for political or commercial purposes"); and nineteen States extend the same prohibition to election records, *see, e.g.*, Minn. Stat. § 10A.02 (Supp. 1997) (reports may not be "utilized ... for any commercial purpose").

In all, thirty-eight States have statutes that restrict either access to or use of otherwise-available public records by those who seek such records with a commercial purpose. The decision of the court below squarely holds that a statute that permits publication in the media of information contained in government records, but denies commercial interests access to such records, violates the First Amendment. This Court's decision will potentially affect all such statutes, and the *amici* States thus have a strong interest in the outcome of the case.

### SUMMARY OF ARGUMENT

As a limitation on access to government records rather than a prohibition on speech concerning matters contained in government records, the provision of the California Public Records Act at issue in this case does not implicate the First Amendment at

all. This Court has made clear that there is no First Amendment guarantee of a right of access to information in the government's control and that restricting access to sensitive information as a means of safeguarding privacy is preferable to limiting or punishing speech involving such information. The Court's decisions involving the federal Freedom of Information Act, on which the California Public Records Act is modeled, establish the validity of a statute which categorically provides that the individual privacy interest in avoiding commercial intrusions in the home outweighs any entitlement to access to information for commercial purposes.

Even if § 6254(D)(3) is viewed as having First Amendment implications, it survives constitutional scrutiny. Under the *Central Hudson* test for commercial speech, a government regulation of speech that concerns lawful activity is valid if it directly advances a substantial government interest and is no more extensive than necessary to serve that interest. Even assuming that the speech proposed by respondent concerns lawful activity, the California statute satisfies the remaining three prongs of *Central Hudson*.

The State's interest in protecting the privacy of arrestees is substantial. The statute directly advances that interest. The court below erred in concluding that, because the statute permits publication of arrestees' names and addresses in the media, it cannot advance their interest in privacy. The privacy interests in avoiding public exposure and in avoiding commercial intrusion in the home are distinct. The fact that the statute authorizes media access to and publication of arrestees' names and addresses does not vitiate the separate right of arrestees to be free of unwanted commercial intrusions. The statute advances this separate interest. Moreover, this Court's cases make clear that some disclosure of personal information does not destroy a privacy right in avoiding further disclosure of such information. The California statute, by limiting but not foreclosing all access

to arrestee address information, validly protects this information from further disclosure. The California statute is closely tailored to the interest it serves, targeting and restricting only commercial speech because that speech is the source of the distinct invasion of privacy against which the State is trying to protect.

## ARGUMENT

### POINT I

#### **THE CALIFORNIA STATUTE IS A VALID LIMITATION ON ACCESS TO PUBLIC RECORDS WITH NO FIRST AMENDMENT IMPLICATIONS.**

The provision of the California Public Records Act at issue in this case restricts would-be commercial users' access to the addresses of crime victims and arrestees. As a limitation on access to government records, it does not implicate the First Amendment at all. Rather, the California statute represents a permissible legislative policy choice that balances a public right of access to government information and the right of privacy that is infringed by disclosure of such information. In accomplishing this balance, the California statute resembles the federal Freedom of Information Act (FOIA), on which the California Public Records Act is modeled. This Court's FOIA cases make clear that a statute limiting disclosure for the sake of privacy neither violates nor implicates the First Amendment.

This case does not involve regulation of constitutionally-protected commercial "speech." The Court's "test for identifying commercial speech" is whether the speech in question "propose[s] a commercial transaction." *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 473-74 (1989) (*cit. om.*). The typical commercial speech case involves either a governmental prohibition on some type of commercial solicitation, *see, e.g., Florida Bar v. Went For It, Inc.*, 515 U.S. 618

(1995) (prohibition on targeted direct-mail solicitation); *Edenfield v. Fane*, 507 U.S. 761 (prohibition on uninvited in-person solicitation), or a limitation on the content of otherwise-permissible commercial speech, *see, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (prohibition on price information in retail liquor advertisements); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (prohibition on display of alcohol content on beer labels).

This case involves neither such restriction. The California Public Records Act generally authorizes "inspection" of all public records, Cal. Gov't Code § 6253 (Deering 1997), but exempts certain records from "disclosure," *id.* § 6254, and in turn excludes from this exemption the addresses of crime victims and arrestees, as long as these are disclosed only to persons with a scholarly, journalistic, political, governmental or investigative purpose, *id.* § 6254(f)(3). The California statute does not address, let alone limit, the right of United Reporting Publishing Corp. ("United Reporting") to advertise or disclose information in any fashion or any medium. Nor does the statute restrict the information United Reporting may use in its advertisements or disclosures. The California statute thus functions as a restriction on access to rather than as a prohibition of speech concerning address information.

The distinction between limiting access to records and restricting speech about information contained in records is critical to a proper perspective on this case. *See Walker v. South Carolina Dept. of Highways & Public Transportation*, 466 S.E. 2d 346, 348 (S.C. 1995) (state statute denying access to accident reports "for commercial solicitation purposes" "regulates only access to information" and "in no way inhibits" exercise of First Amendment rights). In the view of the court below, it is United Reporting's use in commercial speech of address information that triggers the protection of the First Amendment. A restriction on access to government information, however--with certain

exceptions involving criminal proceedings indisputably irrelevant to this case<sup>1</sup> -- has no First Amendment implications. This Court "has never intimated a First Amendment guarantee of a right of access to all sources of information within government control." *Houchins v. KQED, Inc.*, 438 U.S. 1, 9 (1978) (plurality opinion). There is not "a special privilege of access to information as distinguished from a right to publish information which has been obtained." *Id.* at 10; *see also Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information").

The questions of access to government information and of speech incorporating such information simply do not occupy the same constitutional space. The federal government, all fifty States, and the District of Columbia have statutes permitting access to government records. *See generally* Bruce D. Goldstein, Comment, *Confidentiality and Dissemination of Personal Information: An Examination of State Laws Governing Data Protection*, 41 Emory L. J. 1185 (1992). But these statutes are made necessary by the absence of a First Amendment right of access to government information. If such a right existed, the freedom of information laws would be superfluous. Only because "citizens have no First Amendment right of access to traditionally nonpublic government information" must a party seeking release of government information "rel[y] upon a statutory entitlement -- as narrowed by statutory exceptions --

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<sup>1</sup>The Court has recognized a qualified First Amendment right of access to criminal proceedings based on the crucial role traditionally played by public access in the functioning of the criminal justice system. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (access to preliminary hearing in criminal proceeding); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (access to jury selection); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (access to criminal trial during testimony of minor victim); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality opinion) (access to criminal trial). This right has never been held to extend to the contents of a police blotter.



and not upon his constitutional right to free expression." *McGehee v. Casey*, 718 F.2d 1137, 1147 (D.C. Cir. 1983).

Just as there is no constitutional right of access to public records, nothing in the Constitution prohibits a government from allowing access to information only to those with a particular purpose in inspecting it. Access to information is a matter of "legislative grace." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984). It is true that both the FOIA and the California Public Records Act do not generally distinguish between requests for information on the basis of the requester's identity. See *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 771 (1989) ("Congress 'clearly intended' the FOIA 'to give any member of the public as much right to disclosure as one with a special interest'") (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)); *American Civil Liberties Union Foundation of Northern California, Inc. v. Deukmejian*, 651 P.2d 822, 826 (Cal. 1982) (Public Records Act "imposes no limits on who may seek information"). But this is a question of legislative choice rather than constitutional mandate, and a legislature can readily choose otherwise.<sup>2</sup>

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<sup>2</sup>When the government is not constitutionally obliged to provide resources, it may place conditions on the use of the resources it does make available. These conditions may facilitate one sort of speech rather than another in the service of the legislature's policy choices. Thus, for example, in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court upheld a government prohibition on recipients of federal funds for "family planning services" from engaging in abortion counselling and referral. This prohibition, the Court said, did not implicate the First Amendment, for "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program." *Id.* at 193; see also *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) (denial of tax exemption for lobbying organization does not violate First Amendment). In the same way, the California legislature, which need not release address information all, may make it available to those with a

Thus, for example, the predecessor to FOIA, section 3 of the Administrative Procedure Act, 60 Stat. 237 (1946), limited disclosure to "persons properly and directly concerned" with the information. While Congress eventually recognized section 3 "as falling far short of its disclosure goals" and enacted the FOIA, see *Environmental Protection Agency v. Mink*, 410 U.S. 73, 79 (1973) (reviewing legislative history of FOIA), it did so as a matter of policy rather than constitutional requirement. Similarly, § 6254(f)(3), in its categorical judgment that access to address information should be denied to commercial interests and curiosity-seekers but granted to others, is no more than a permissible policy decision. It differs from the general Public Records Act policy of granting access to all when it is granted to anyone, but the difference has no First Amendment meaning.

Indeed, the Court has made clear that limiting access to information in the government's possession is preferable to restricting the speech use that may be made of the information once it is disclosed. In *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), a newspaper published the name of a rape victim obtained from a publicly-released police report. The Court invalidated on First Amendment grounds the newspaper's liability under a Florida statute that made it unlawful to "print, publish or broadcast" the name of a victim of a sexual offense. *Id.* at 526. In the Court's view, the government, without prohibiting or penalizing speech,

retains ample means of safeguarding significant interests upon which publication may impinge.... To the extent sensitive information is in the government's custody, it has even greater power to forestall or mitigate the injury caused by its release. The govern-

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scholarly or governmental interest but not to those with a commercial purpose without implicating the First Amendment.

ment may classify certain information [or] establish and enforce procedures ensuring its redacted release.... Where information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts.

*Id.* at 534. In other words, restricting access is "less drastic" than restricting speech: A government's refusal to provide sensitive information to the public is a "far more limited means of guarding against dissemination than the extreme step of punishing truthful speech." *Id.* at 538.

It is therefore from the perspective not of First Amendment law, but of freedom of information law, that the provision of the California Public Records Act at issue in this case can best be understood. The California Public Records Act is modeled on the federal FOIA, 5 USC § 552 (1996), and judicial construction "of the federal act serve[s] to illuminate the interpretation of its California counterpart." *American Civil Liberties Union*, 651 P.2d at 828. The federal FOIA exempts from disclosure personnel files "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 USC § 552(b)(6) (1996). This Court's decisions on and discussions of the federal FOIA leave no doubt that the restrictions on access to address information embodied in § 6254(f)(3) are a valid exercise of government authority that does not implicate First Amendment concerns.

The principal purpose of § 6254(f)(3), as recognized by the court below, is protection of the privacy of victims and arrestees by confining disclosure of their addresses to persons with certain noncommercial interests. *United Reporting Publishing Corp. v. California Highway Patrol*, 146 F.3d 1133, 1138 (9th Cir. 1998). This Court has recognized the significant privacy interest of an individual in his or her home address. In *United States*

*Department of Defense v. Federal Labor Relations Board*, 510 U.S. 487 (1994), the collective-bargaining representatives of certain federal agency employees made FOIA requests for the employees' names and home addresses. The agencies provided the names but refused to release the home addresses, contending that their disclosure would constitute a clearly unwarranted invasion of personal privacy. The Court, in upholding the agencies' refusal, noted that "the employees' interest in nondisclosure [of their addresses] is not insubstantial." *Id.* at 500. This was so, moreover, even though home addresses are often publicly available through other sources. *Id.* As the Court observed, "[t]he privacy interest protected by [§ 552(b)(6)] 'encompass[es] the individual's control of information concerning his or her person,'" and this interest "does not dissolve simply because that information may be available to the public in some form." *Id.* (quoting *Reporters Committee*, 489 U.S. at 763).

It was precisely the employees' right to be free from unwelcome mail solicitation that provided the basis for the refusal of the FOIA request. "Even if the direct union/employee communication facilitated by the disclosure of home addresses were limited to mailings, this does not lessen the interest that individuals have in preventing at least some unsolicited, unwanted mail from reaching them at their homes." *Department of Defense*, 510 U.S. at 501; see also *Hopkins v. United States Department of Housing & Urban Development*, 929 F.2d 81, 88 (2d Cir. 1991) (likelihood that requesting union will use address information "to contact employees at their homes dramatically increases the already significant threat to the employees' privacy interests" from disclosure of payroll records). The Court professed itself "reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions." *Department of Defense*, 510 U.S. at 501.

Moreover, the Court added, "when we consider that other parties, such as commercial advertisers and solicitors," would



"have the same access under FOIA as the union" to the address lists, it was "clear that the individual privacy interest that would be protected by nondisclosure is far from insignificant." *Id.* at 501. Other federal courts, including the Ninth Circuit, likewise have found the solicitation that would result from disclosure of address lists to commercial interests to be an unwarranted invasion of privacy under FOIA and have also deemed no First Amendment concerns to be implicated. See *Lepelletier v. Federal Deposit Insurance Corp.*, 164 F.3d 37 (D.C. Cir. 1999) (list of depositors of unclaimed funds requested by "money finder" redacted in light of "the barrage of solicitations" that would follow disclosure); *Professional Programs Group v. Department of Commerce*, 29 F.3d 1349 (9th Cir. 1994) (requester's "purely commercial" interest in "obtain[ing] a list of potential customers" is "easily outweighed by the degree of the invasion into personal privacy"); *Minnis v. United States Department of Agriculture*, 737 F.2d 784, 786 (9th Cir. 1984) ("purely commercial" use of list of names and addresses outweighed by interest in personal privacy), *cert. denied*, 471 U.S. 1053 (1985); *Wine Hobby USA, Inc., v. Internal Revenue Service*, 502 F.2d 133, 137 (3d Cir. 1974) (list of names and addresses denied to commercial concern when a consequence of disclosure would be "unsolicited and possibly unwanted mail from [requester] and perhaps offensive mail from others").

The legislative balance struck by § 6254(f)(3) simply reflects the balance struck *ad hoc* and upheld in the foregoing decisions under the FOIA exemption in § 552(b)(6). The California legislature has determined that, in any given case, the right to disclosure of a list of victims' or arrestees' addresses to those interested in using them for commercial purposes is outweighed by the victims' and arrestees' privacy interest. *Department of Defense* indicates that there is nothing inherently impermissible in such a determination. Nor is the categorical, as opposed to *ad hoc*, nature of the California provision problematic. In *Reporters Committee*, 489 U.S. 749 (1989), the Court considered whether

the contents of an individual's FBI "rap sheet" were protected by FOIA exemption 7(c), which excludes from disclosure information compiled for law enforcement purposes if disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 USC § 552(b)(7)(c) (1996). The Court undertook to "balance the public interest in disclosure against the interest Congress intended the Exemption to protect," 489 U.S. at 776. It concluded not only that the interest in individual privacy outweighed the public interest in disclosure of the rap sheet in the particular case, but also that such a determination could be made categorically. In other words, in the entire "class of cases without regard to individual circumstances" in which "the subject of ... a rap sheet is a private citizen and ... the information is in the Government's control as a compilation," "as a categorical matter" a third party's request for information will invariably constitute an unwarranted invasion of privacy. *Id.* at 780.

What the Court accomplished in holding that, under a particular FOIA provision, "categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance [between disclosure and privacy] characteristically tips in one direction," *id.* at 776, a legislature may also accomplish in the first instance, by expressly providing in a statute that certain information is categorically exempt from disclosure under certain circumstances. And that is what the California legislature has done in § 6254(f)(3). As petitioner notes, the media do not routinely disclose the home addresses of most victims and arrestees. The legislature concluded that the occasional, unsystematic disclosure of victims' and arrestees' addresses that occurs in the press is acceptable, but that the massive disclosure and exploitation of the same addresses by commercial interests is not. Having balanced the public interest in disclosure of victims' and arrestees' addresses against the invasion of privacy that follows such disclosure, the legislature concluded that the invasion by



commercial interests was always unwarranted. It is a permissible conclusion, and one that -- like any other government decision not to disclose information -- does not implicate the First Amendment.

Thus, the California statute at issue in this case simply denies access to victims' and arrestees' address information to those with a commercial interest in the information. Such a restriction has no First Amendment implications, and the court below was mistaken in treating it as an infringement of United Reporting's commercial speech. The statute is no more than a permissible legislative balancing of the entitlement of commercial concerns to access to the information and the privacy right of arrestees to be free of unwelcome commercial solicitation.

## POINT II

### THE CALIFORNIA STATUTE IS A VALID RESTRICTION ON COMMERCIAL SPEECH.

Even if § 6254(f)(3) is viewed as having First Amendment implications, it survives constitutional scrutiny. Insofar as the statute restricts commercial speech, it does so no more extensively than necessary in direct advancement of California's substantial interest in preserving the privacy of arrestees, and therefore satisfies the First Amendment.

The test formulated by the Court for cases involving government restrictions on commercial speech requires that the commercial speech in question "concern lawful activity and not be misleading"; that the government interest supporting the restriction be "substantial"; that the regulation at issue "directly advanc[e] the governmental interest asserted"; and that the regulation be no "more extensive than is necessary to serve that interest." *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980).

The Court has recently reconceived *Central Hudson* as entailing a threshold inquiry into whether commercial speech "concerns lawful activity or is misleading," in which case the activity may be "freely regulate[d]." *Florida Bar*, 515 U.S. at 624, followed by a "three-part" test, *id.* at 635; *see also id.* at 636 (Kennedy, J., dissenting) (approving of Court's "three-part inquiry"). Even if any "speech" by United Reporting making use of address information in police reports is deemed to concern lawful activity, the company cannot prevail under the remaining three prongs of *Central Hudson*.

There can be no serious question that, as the court below recognized, the government interest in protecting the privacy of arrestees is substantial. This Court has observed, in its commercial speech jurisprudence as in its FOIA cases, that "the protection of potential clients' privacy [from commercial solicitation] is a substantial state interest." *Florida Bar*, 515 U.S. at 625 (quoting *Edenfield*, 507 U.S. at 769).

The Ninth Circuit erred, however, in concluding that § 6254(f)(3) fails to advance the Government's interest in a direct and material way. That court believed that restricting use of personal address information for commercial purposes in order to vindicate victims' and arrestees' right of privacy while "allow[ing] the names and addresses of the same to be published in any newspaper, article or magazine in the country" was "not rational," for the exceptions to the restrictions in the statute "'undermine and counteract' the asserted government interest in preserving privacy" 146 F.3d at 1140. This view overlooks the fact that a privacy interest in avoiding commercial intrusions remains substantial and worthy of governmental protection even when some infringement of a different sort of privacy interest is permitted.

The court below, like other courts to have considered similar statutes, invoked *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466,

476 (1988), in which this Court, invalidating a State ban on attorney targeted-mail solicitation, rejected the contention that such solicitation "invade[s] the recipient's privacy any more than does a substantively identical letter mailed at large. The invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery." *See Amelkin v. McClure*, No. 94-00360, 1999 WL 73993 (6th Cir. Feb. 17, 1999) (invalidating Kentucky limitation on access to accident reports); *Speer v. Miller*, 864 F. Supp. 1294 (N.D. Ga. 1994) (invalidating Georgia limitation on access to crime and accident reports).

More recent cases of this Court, however, reject *Shapero's* all-or-nothing view of privacy. They recognize instead that there are different types of privacy, that permitting an invasion of one type of privacy leaves unimpaired the interest in avoiding infringements of other types, and that an initial invasion of privacy does not render subsequent invasions harmless. The basic insight of these cases, whether decided under the First Amendment or FOIA, is that some loss of privacy in personal information does not amount to or require a complete loss of privacy. It is this insight that animates § 6254(f)(3), which authorizes access to address information for some but not for others. It is true that, as the Court noted in *Reporters Committee*, a right to privacy in information diminishes as the information becomes public, 489 U.S. at 763 and n 15. But because the California statute insulates crime victims and arrestees not from exposure but from intrusion, widespread publication of their identities still leaves them with an interest in avoiding invasion of their privacy by commercial concerns. The statute vindicates that interest.

The Court has distinguished carefully between an invasion of privacy by virtue of "a physical or other tangible intrusion into a private area" and an invasion by virtue of "the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual." *Cox*

*Broadcasting Corp. v. Cohn*, 420 U.S. 469, 489 (1975); *see generally* W. Page Keeton *et al.*, *Prosser & Keeton on the Law of Torts*, 849-866 (5th ed. 1984) (recognizing four distinct kinds of invasion of privacy, including public disclosure of private facts and intrusion upon physical solitude or seclusion). Exposure and intrusion are entirely distinct species of invasion of privacy, and there is no suggestion that the former encompasses or eclipses the latter. Even if, as the court below thought, access to victims' and arrestees' address information is constitutionally indistinguishable from publication of that information, such exposure differs in kind from the intrusion that will follow the commercial access forbidden by the California statute.

The Court explicitly recognized this difference in *Florida Bar v. Went For It, Inc.*, where it reviewed a regulation limiting targeted direct-mail solicitation by attorneys. The Court criticized *Shapero's* "treatment of privacy" as "casual" and "perfunctory." 518 U.S. at 629-30. It recognized that there are "different kind[s] of intrusion": one that occurs when a lawyer "learn[s] about an accident or disaster," and another upon "the lawyer's confrontation of victims or relatives with such information." *Id.* at 630. The fact that attorneys had learned the identities of accident victims did not prevent the regulation from directly advancing the victims' interest in avoiding the separate invasion of privacy resulting from receipt of solicitations. *Id.* at 629-632. In other words, exposure of embarrassing or painful information does not leave an individual defenseless when that information is used to intrude upon his or her privacy in a different way.

Nor does the privacy interest in precluding discovery of personal information dissipate as soon as the information is known to anyone. It is by no means self-evident that identification as a crime victim or arrestee in the press is a greater invasion of privacy than widespread exposure as such to commercial interests. *Cf. Amelkin*, 1999 WL 73993 at \*11 (Siler, J., concurring in part and dissenting in part) (identification as



accident victim in news media "intrudes much less than publication in a commercial pamphlet intended to aid attorneys and chiropractors in soliciting the victims"). But in any event, an individual whose privacy is invaded retains a privacy interest in restricting further dissemination of personal information. This is demonstrated most starkly by the Court's action in *Florida Star*. There, as noted above, the Court refused to penalize a newspaper for publishing the name of a rape victim. The victim's name was known to both the newspaper and its readers. Yet the Court, "[r]especting" the victim's privacy interests, referred to her only by her initials. 491 U.S. at 527 n 2. It would not have done so had the initial exposure rendered further attempts at concealment pointless.

The Court's FOIA cases likewise make clear that some loss of privacy does not vitiate all efforts to restrict further access to the disclosed information. The issue is discussed at length in *Reporters Committee*, in which the events summarized in the "rap sheet" being sought in the case had previously been disclosed piecemeal to the public. The requester of the information argued that because of the prior disclosures, the subject of the rap sheet's "privacy interest in avoiding disclosure of the federal compilation of these events approaches zero." 489 U.S. at 762-63. The Court rejected this "cramped notion of personal privacy." *Id.* at 763. "In an organized society," the Court remarked, "there are few facts that are not at one time or another divulged to another." *Id.* "Meaningful discussion of privacy, therefore, requires the recognition that ordinarily we deal not with an interest in total nondisclosure but with an interest in selective disclosure." *Id.* at 763 n 14 (quoting Karst, "The Files": Legal Controls over the Accuracy and Accessibility of Stored Personal Data, 31 Law & Contemp. Prob. 342, 343-44 (1966)). The Court quoted the dictionary definition of "private" as "'intended for or restricted to the use of a particular person or group or class of person: not freely available to the public.'" *Reporters Committee* at 763-64 (cit. om.). Relying on "this attribute of a privacy interest," the

Court recognized "the distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole." *Id.* at 764. Thus, the Court concluded, "the fact that 'an event is not wholly "private" does not mean that an individual has no interest in limiting disclosure or dissemination of the information.'" *Id.* at 770 (quoting Rehnquist, *Is An Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, Nelson Timothy Stephens Lectures, University of Kansas Law School, pt. 1, p. 13 (Sept. 26-27, 1974)); see also *Department of Defense*, 510 U.S. at 500-501 (recognizing that interest in privacy "does not dissolve" upon initial public access to information).

In any event, even if access to victims' and arrestees' addresses could become so general as to destroy their asserted privacy interest in all its dimensions, that is not what has happened so far, as this litigation itself demonstrates. In *Reporters Committee*, the Court recognized the difference between information "freely available" in piecemeal, "hard-to-obtain" form and the same information found in a centralized summary. 489 U.S. at 764. A party seeking disclosure of government information is in no position to suggest that its access to information is not an invasion of privacy simply because the information may be available from a different source or in a different form. "[I]f the summaries were 'freely available,'" the Court remarked in *Reporters Committee*, "there would be no reason to invoke the FOIA to obtain access to the information they contain." *Id.* And the same is true with respect to address information for victims and arrestees. This information is accessible to and may be published by those with journalistic, scholarly, political, governmental, and investigative purposes, and may thereafter be used by anyone for any purpose. But the presence of United Reporting in this lawsuit suggests that the resulting access is insufficient for commercial purposes. Systematic inspection of victims' and arrestees' addresses *en*



*masse*, of the sort that makes commercial solicitation practicable, simply does not occur in the absence of undertakings like United Reporting's. See *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1514 (10th Cir.), *cert. denied*, 513 U.S. 1044 (1994) (upholding Colorado prohibition on access to criminal justice records for commercial purposes against First Amendment challenge and noting "that plaintiffs would not be involved in this litigation if the information they seek is so widely available that the privacy ... is no longer at issue"). The fact that the limited access authorized by the California statute produces substantially less disclosure of address information than would result from making the information accessible to everyone means that the privacy interest vindicated by the statute is neither illusory nor trivial.

A comparison between the present case and *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), on which the Ninth Circuit principally relied, is instructive in this regard. *Coors* involved a federal statute prohibiting beer labels from displaying the products' alcohol content. The government argued that the labeling ban was necessary to suppress the threat of "strength wars" among brewers, who would otherwise compete in the marketplace on the basis of the potency of their beers. This interest, while deemed substantial by the Court, was not directly advanced by the labeling ban "because of the overall irrationality of the Government's regulatory scheme." *Id.* at 488. There were, the Court reasoned, too many "exemptions and inconsistencies" in the scheme: It applied different policies to labels and to advertisements; it applied "only in States that affirmatively prohibit such advertisements"; it did not apply to wines and spirits; it permitted brewers to signal high alcohol content through use of the term "malt liquor." *Id.* at 488-489. In short, "the irrationality of this unique and puzzling regulatory framework ensures that the labeling ban will fail to achieve" its asserted purpose of "combating strength wars." *Id.* at 489.

A beverage's alcohol content is a bare fact that either is or is not disclosed. Because disclosure of this information has only one possible use -- as a purchasing criterion for consumers -- all disclosures of it are equivalent, and one form of disclosure renders pointless efforts to suppress disclosure in other forms. In the present case, by contrast, because privacy is subject to incremental infringements of different types and magnitudes, crime victims' and arrestees' interest in privacy is directly advanced even by a government regulation that permits access to and publication of their addresses in some circumstances. As this Court recognized in *Florida Bar*, there are "different kind[s] of intrusion" into privacy. 515 U.S. at 630. One invasion of privacy occurs, obviously, when arrest records are made accessible at all. Another, of a different sort, occurs when an arrestee's status as such is disclosed in the press. And a third invasion of privacy, *of a different order entirely*, occurs when arrestees have their addresses disclosed to commercial concerns and become susceptible to the barrage of solicitation that follows.

These multiple aspects of privacy are also what distinguish the present case from *Florida Star*. The statute at issue in that case suffered from, *inter alia*, "facial underinclusiveness" by punishing only publication of a rape victim's name in "instrument[s] of mass communication" and ignoring "[a]n individual who maliciously spreads word of the identity of a rape victim." 491 U.S. at 540. The State's failure to take "more careful and inclusive precautions against alternative forms of dissemination" meant that Florida's "selective ban on publication by the mass media" failed to accomplish its stated purpose of protecting privacy. *Id.* at 541. As in *Coors*, disclosure of a single piece of information (the identity of a rape victim) was at stake and a single type of privacy interest (exposure of embarrassing or painful information) was involved. The State's failure to prohibit all means of disclosure of this one fact undermined the asserted purpose of the statute. The privacy interest of the victim lay entirely in her

identity and thus was exhausted once her identity was disclosed.

The California law, by contrast, targets a particular type of disclosure -- use of address information in bulk for solicitation of arrestees -- and is tailored to achieve precisely that purpose. If those whom the statute authorizes to use the address information routinely published lists of addresses of arrestees, then *Coors* and *Florida Star* might apply. But they do not, and victims and arrestees retain a significant privacy interest in their addresses even when their identities are publicly disclosed. Thus, § 6254(f)(3) directly advances the State's interest in protecting the privacy of victims and arrestees from the onslaught of commercial solicitation that would result from permitting access to and publication of address lists.

The statute is likewise no more extensive than necessary to serve the State's interest in preserving the privacy of arrestees. This last prong of *Central Hudson* requires only a "reasonable fit" between a government's "legitimate interests" and "the means chosen to serve those interests." *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993). This is, the Court has said, "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served' [cit. om.]; that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective." *Board of Trustees of SUNY*, 492 U.S. at 480.

The California statute is closely tailored to the public interest it serves. Commercial solicitation is, as this Court has made clear, a distinct species of invasion of privacy. The individual interest in avoiding this particular type of invasion of privacy differs from the interest in avoiding the identification as an arrestee that occurs when one's name is published by the media. Just as United Reporting's appetite for address lists of arrestees is not sated by scholarly or journalistic publication of information

about arrestees, so the arrestees' interest in avoiding commercial solicitation survives these uses. The statute targets commercial use of arrestees' addresses, and only such use, while in no way inhibiting the media's right to publish truthful information.

The present case thus does not resemble *Discovery Network*, in which the Court invalidated a ban, assertedly for aesthetic purposes, on freestanding newsracks containing commercial handbills. The ban did not affect the far more numerous newsracks devoted to distribution of newspapers. The central flaw in the ban was that its "distinction between commercial and noncommercial speech" bore "no relationship *whatsoever* to the particular interests" asserted by Cincinnati. 507 U.S. at 425. Rather, the city seems to have banned only commercial newsracks because that is all it thought it *could* ban: the supposedly lower value of commercial speech rendered it more susceptible to regulation than newspapers. *Id.* at 427-28. The fact that "the distinction Cincinnati has drawn has absolutely no bearing on the interests it has asserted" meant that the city had failed to "establis[h] the 'fit' between its goals and its chosen means" required by the fourth prong of *Central Hudson*. *Id.* at 428.

The California statute, by contrast, targets commercial speech not because such speech is more susceptible to government regulation but because it is the source of the distinct invasion of privacy against which the State is trying to protect. The distinction between commercial and scholarly, journalistic, governmental or investigative use of address information is, in the Court's phrase, "relevant to an interest asserted by" the State, *id.* at 428. That interest lies in protecting arrestees from the separate invasion of their privacy that occurs when address lists are used for commercial solicitation. A statute which precludes such use, while leaving untouched other uses of the information that do not result in a barrage of solicitation, is precisely tailored to achieve its legitimate purpose.

As noted in the preceding section, § 6254(f)(3) is more accurately regarded as a restriction on access to government records than as a limitation on speech, and thus properly viewed from the perspective of cases involving freedom of information statutes rather than in terms of the First Amendment. But even if address lists, as used by United Reporting, are commercial speech requiring review of California's statute under the *Central Hudson* standard, the limitations on their use embodied in the statute are narrowly tailored to serve directly and materially the State's interest in preserving arrestees' privacy from commercial solicitation. The statute accordingly satisfies the First Amendment.

## CONCLUSION

**FOR THE FOREGOING REASONS, THE JUDGMENT  
OF THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT SHOULD BE REVERSED.**

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

LOS ANGELES POLICE DEPARTMENT,  
*Petitioner,*

v.

UNITED REPORTING PUBLISHING CORP.,  
*Respondent.*

On Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

**BRIEF AMICUS CURIAE FOR  
THE NEWSLETTER PUBLISHERS ASSOCIATION  
IN SUPPORT OF RESPONDENT**

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IN THE  
**Supreme Court of the United States**

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No. 98-678

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LOS ANGELES POLICE DEPARTMENT,  
v. *Petitioner*,  
UNITED REPORTING PUBLISHING CORP.,  
*Respondent*.

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit

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**BRIEF AMICUS CURIAE FOR  
THE NEWSLETTER PUBLISHERS ASSOCIATION  
IN SUPPORT OF RESPONDENT**

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**INTEREST OF THE AMICUS CURIAE**

The Newsletter Publishers Association ("NPA") represents the interests of publishers of more than 2,600 newsletters and specialized information services.<sup>1</sup> Collectively, members of the NPA publish on virtually every

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, the NPA states that no counsel for a party to this action authored any portion of this brief *amicus curiae* and that no person or entity other than the NPA made a monetary contribution to the preparation or submission of this brief. The NPA further states that neither Respondent nor any other party to this action is a member of the NPA. Written consent of all parties to the filing of this brief *amicus curiae* has been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3(a).

major subject of public concern, with titles ranging from *AIDS Clinical Care* to the *Indian Subcontinent Monitor*, and from *Personal Finance* to the *Zoning Bulletin*. Contrary to this Court's precedent, the Court of Appeals held in this case that Respondent's newsletter and ancillary information service do not constitute "core" speech entitled to the full measure of protection afforded by the First Amendment. The Court of Appeals instead deemed Respondent's activities to constitute commercial speech entitled only to a lesser degree of constitutional protection. The Ninth Circuit's expansion of the category of speech deemed commercial devalues the speech not only of Respondent, but of a whole class of publications heretofore understood to be entitled to the full protection of the First Amendment.

#### SUMMARY OF ARGUMENT

This case tests the constitutionality of a California statute that purports to discriminate between commercial and non-commercial users who request access to certain information contained in arrest records. The courts below determined that Respondent, the publisher of a newsletter and proprietor of a related information service, is engaged in activities that constitute "commercial" speech, but that the statute in question infringes even the limited rights available to commercial speakers under the First Amendment. Regardless of how the Court resolves the constitutionality of the particular statute at issue, the NPA respectfully urges the Court to reject the reasoning of the courts below that led them to hold that newsletters like the one published by Respondent are anything other than core speech entitled to the full shelter of the First Amendment.

The conclusion of the courts below that Respondent's newsletter and ancillary information service are commer-

cial rather than core speech disregards the journalistic nature of such publications and constitutes an unwarranted and unworkable enlargement of the Court's commercial speech doctrine. More specifically, the courts below appear to have overlooked that Respondent's publications—its newsletter and ancillary information service—are not themselves advertisements or solicitations, the kind of invitations to commercial transactions to which this Court previously has limited application of the commercial speech doctrine. Indeed, the Ninth Circuit's expansion of the category of commercial speech to include *any* speech concerned solely with the economic interests of the speaker and its audience threatens to engulf a wide variety of news and information sources beyond the particular products published by Respondent. Further, the Ninth Circuit appears to have confused Respondent's publications with speech in which its customers ultimately may engage based on information they obtain from Respondent. Nothing in this Court's explication of the commercial speech doctrine supports such a broad reformulation of this less-favored category of speech.

The nature of newsletters as a class of periodicals underscores the constitutionally unacceptable result that follows from the Ninth Circuit's reasoning. Newsletters present important information on specialized subjects to their readers in a timely and comprehensible fashion, in the best tradition of the American press. As such, newsletters long have been understood by the courts to be entitled to invoke the full protection of the First Amendment in a variety of contexts. The Ninth Circuit's conclusion to the contrary disregards this well-established authority and devalues speech of unquestionable public importance. To permit the Ninth Circuit's classification of Respondent's newsletter as commercial speech to stand

would be to alter fundamentally the constitutional protection available to a wide array of publishers, including the members of the NPA.

### ARGUMENT

**REGARDLESS OF HOW THE COURT RESOLVES THE VALIDITY OF THE PARTICULAR STATUTE AT ISSUE, IT SHOULD NOT RETREAT FROM ITS PREVIOUS ACKNOWLEDGMENT THAT THE SPEECH OF NEWSLETTER PUBLISHERS IS ENTITLED TO THE FULL PROTECTIONS OF THE FIRST AMENDMENT**

The California statute at issue here purports to prohibit the release of certain information regarding arrestees to requesters who will use the information "directly or indirectly to sell a product or service," although the statute expressly exempts from its prohibition, *inter alia*, requests made for a "journalistic . . . purpose." Cal. Gov't Code § 6254(f)(3).

Respondent United Reporting Publishing Corp. ("United Reporting") publishes a newsletter, entitled *The 'Jailmail' Register* (the "*Register*"), that reports on various topics relevant to law enforcement and criminal defendants. *See, e.g.*, Excerpts of Record ("ER") 195-202. The newsletter also includes, as a regular feature, a "blotter" of the names and addresses of persons recently charged with various criminal offenses. ER 198, 202. United Reporting also offers an ancillary "dial up" information service through which persons may obtain such address data directly in other formats. *See id.* Concerned that the statute could be read to apply to its activities, United Reporting sought a judicial declaration that the statute violates the First Amendment.

Disregarding a long line of authority (including decisions of this Court), the Ninth Circuit rejected United

Reporting's argument that its newsletter and ancillary information service are noncommercial speech, the regulation of which is subject to strict scrutiny under the First Amendment. *United Reporting Publ'g Corp. v. California Highway Patrol*, 146 F.3d 1133, 1136 (9th Cir. 1998). Rather, the Ninth Circuit held that United Reporting's publications constitute "commercial" speech, and proceeded to declare the challenged statute invalid as a violation of the more limited rights secured to commercial speakers by the First Amendment. The NPA respectfully submits that the court below erred, not in the result it ultimately reached, but rather by classifying the newsletter and ancillary information service as commercial speech in the first instance. This error, if endorsed by this Court or simply permitted to stand unchallenged, would sweep out from the full shelter of the First Amendment a whole class of speech that this Court has recognized serves the Amendment's core values.

#### **A. The Ninth Circuit's Unbounded Definition Of Commercial Speech Conflicts With This Court's Precedents And Would Encompass Most Newsletters As Well As Numerous Other Sources Of News And Information**

As Justice Scalia observed in *Board of Trustees v. Fox*, 492 U.S. 469, 473-74 (1989), in a commercial speech case, "the first question we confront is whether the principal type of expression at issue is commercial speech." This examination must proceed "carefully," this Court has cautioned, "to ensure that speech deserving of greater constitutional protection is not inadvertently suppressed." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983); *see also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504-05 (1984) (where case presents question of whether particular speech falls within category "to which the majestic protection of the



First Amendment does not extend," the "Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited").

Notwithstanding the cautious approach urged by this Court, the Ninth Circuit in this case swept into its definition of commercial speech "any 'expression related solely to the economic interests of the speaker and its audience.'" *United Reporting Publ'g Corp. v. California Highway Patrol*, 146 F.3d at 1137 (emphasis added) (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980)). In so defining commercial speech, the Ninth Circuit appears to have overlooked this Court's admonition in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), that, in its more recent rulings regarding the scope of the category of commercial speech, the Court "did *not* simply apply the broader definition of commercial speech advanced in *Central Hudson*," *id.* at 423 (emphasis added)—precisely the definition applied here by the Ninth Circuit. Indeed, having first adopted this sweeping definition of commercial speech, the Ninth Circuit then proceeded to characterize the speech at issue—United Reporting's newsletter and ancillary information service—as follows:

United Reporting sells arrestee information to clients; *nothing more*. Its speech can be reduced to, "I [United Reporting] will sell you [client] the X [names and addresses of arrestees] at the Y price."

*Id.* (emphasis added; other alterations in original). This, the Ninth Circuit held, "is a pure economic transaction

comfortably within the 'core notion' of commercial speech." *Id.* (internal citation omitted).<sup>2</sup>

The court below, however, fundamentally misconstrued the speech in which United Reporting seeks to engage. That speech is not (as the Ninth Circuit characterized it) an *advertisement or solicitation* by United Reporting for the sale of its newsletter or ancillary information service, which might fairly be termed commercial speech, but rather *the information communicated within* the newsletter and information service themselves. Such information cannot logically be characterized as a mere proposal to engage in a commercial transaction, any more than can the information contained in any book or daily newspaper sold for a price. Unlike the speech engaged in by an advertiser that is designed solely for the purpose of selling the speaker's product or service, the speech at issue here *is* the very product or service of value that United Reporting is in business to disseminate, a distinction of dispositive significance.<sup>3</sup> The public dissemination of such in-

<sup>2</sup> The Ninth Circuit's "X for Y" formulation is derived directly from Justice Blackmun's description of the speech at issue in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976)—speech that, in the form of a price list, was plainly and exclusively an advertisement for the sale of goods:

Our pharmacist does not wish to editorialize on any subject, cultural, philosophical or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price."

*Id.* at 761. In contrast to the speech at issue in *Virginia State Board of Pharmacy*, United Reporting does indeed wish to report newsworthy facts, and, as explained in text, the speech at issue here is no mere proposal to engage in a commercial transaction with the speaker.

<sup>3</sup> Even if the contents of United Reporting's newsletter or its ancillary information service could somehow be characterized as a

formation simply does not constitute the kind of speech heretofore deemed to be commercial. *Argello v. City of Lincoln*, 143 F.3d 1152, 1153 (8th Cir. 1988) (quoting trial court's observation that "there is a distinct difference between the offer to tell a fortune ('I'll tell your fortune for \$20.'), which is commercial speech, and the actual telling of the fortune ('I see in your future . . .') which is not").

Rather, as this Court originally formulated it, commercial speech is expression that does "no more than propose a commercial transaction." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973) (emphasis added). The Ninth Circuit's construction of this Court's subsequent decision in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. at 561, as announcing a different, far broader standard cannot be squared with either the language or logic of numer-

solicitation for a commercial transaction, that would not be dispositive of whether the information constitutes commercial speech. "[T]he mere fact that [materials] are . . . advertisements clearly does not compel the conclusion that they are commercial speech." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. at 66; see also, e.g., *National Life Ins. Co. v. Phillips Publ'g, Inc.*, 793 F. Supp. 627, 645 (D. Md. 1992) (recognizing that promotional materials disseminated by a specialized financial newsletter do not constitute commercial speech); *Lane v. Random House, Inc.*, 985 F. Supp. 141, 152 (D.D.C. 1995) (noting that speech is "protected even if styled as a solicitation to purchase," court held advertisement for book is not commercial speech). Furthermore, that the newsletter may contain a reference to a specific product, i.e., the ancillary information service, "does not by itself render the [material] commercial speech." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. at 66. And "the fact that [United Reporting] has an economic motivation for mailing the [material] would clearly be insufficient by itself to turn the materials into commercial speech." *Id.* at 67. While the combination of such characteristics can provide support for the conclusion that particular material constitutes commercial speech, *id.*, the court below engaged in no such analysis with respect to United Reporting's newsletter and service.

ous other precedents of the Court, decided both before and after *Central Hudson*. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748, 761-62 (1976), for example, the Court observed four years before *Central Hudson* that speech is not commercial *merely* because it concerns only the financial interests of the recipients.

Similarly, three years after deciding *Central Hudson*, the Court in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983), evaluated two fliers and a pamphlet concerning prophylactic products. As the Court pointed out, its earlier "decisions have recognized 'the "common-sense" distinction between *speech proposing a commercial transaction*, which occurs in an area traditionally subject to government regulation, and other varieties of speech.'" *Id.* at 64 (citation omitted) (emphasis added); see also *id.* at 65 (category of speech that is commercial is distinguished by "the greater potential for deception or confusion in the context of certain *advertising messages*") (emphasis added). As for the two advertising fliers at issue in *Bolger*, the Court explained that they were clearly "speech which does 'no more than propose a commercial transaction'" and, accordingly, were deemed commercial. *Id.* at 66 (citations omitted). The pamphlet fell into the same category notwithstanding that it discussed venereal disease because it both was intended as an advertisement to promote the sale of the speaker's prophylactic products and made specific reference to those products—in other words, the pamphlet was speech primarily intended to promote a commercial transaction between the speaker and the recipients of the speaker's message. See *id.* at 66-67; see also, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. at 423 (observing that Court in *Bolger* did not apply *Central Hudson's* broad definition of commercial speech as that consisting of any speech related solely



to speaker's and listener's economic interests); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 494 (1995) (Stevens, J., concurring in judgment) ("[a]s a matter of common sense, any description of commercial speech that is intended to identify the category of speech entitled to less First Amendment protection should relate to the reasons for permitting broader regulation: namely, commercial speech's potential to mislead" consumers); *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993) (commercial speech doctrine distinguishes between speech proposing a commercial transaction and other varieties of speech); *Board of Trustees v. Fox*, 492 U.S. at 473-74 ("the test for identifying commercial speech" is whether it "propose[s] a commercial transaction"); *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 8-9 (1986) (Powell, J., announcing judgment) (nature of newsletter at issue "extends well beyond speech that proposes a business transaction" and thus is fully protected by First Amendment); cf. *Edenfield v. Fane*, 507 U.S. 761, 765 (1993) (acknowledging possibility that "ambiguities may exist at the margins of the category of commercial speech," but emphasizing that "solicitations" are at core of concept).

At bottom, what underlies virtually all of the Court's prior commercial speech cases is the notion that the doctrine is intended to permit limited regulation of speech directed at persuading consumers to enter into commercial transactions with the speaker. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978) (emphasizing that commercial speech doctrine is concerned with "speech proposing a commercial transaction"). United Reporting's speech at issue here simply does not share this fundamental characteristic. There is, therefore, no constitutional basis for characterizing the entirety of United Reporting's publications as "commercial speech," as the Ninth Circuit has done.

Indeed, if the Ninth Circuit's formulation is correct, then countless publications heretofore thought to contain core speech fully protected by the First Amendment would be recategorized as commercial speech. See P. Cameron DeVore & Robert D. Sack, *Advertising & Commercial Speech* § 2.2, at 2-10 to 2-11 (1999). For example, the newsletter *Megawatt Daily*, which includes significant news and analysis on the electric power industry of interest to its subscribers, see *infra* at 16 n.6, features in each issue tables of pricing data for electric power throughout the nation. This data undoubtedly is intended to serve the financial interests of the newsletter's readers, and is placed in the newsletter at least in part for the purpose of enhancing its value to those subscribers. Because, for these reasons, *Megawatt Daily's* speech could be characterized under the Ninth Circuit's rationale as relating solely to the economic interests of the speaker and its audience, the publication presumably would be treated as commercial speech. So too would *Inside Mortgage Finance*, see *infra* at 16 n.6, because that newsletter includes, as one of its principal features, tables of data concerning mortgage originations and mortgage purchase activity by Fannie Mae and Freddie Mac. Such data apparently would be characterized, under the Ninth Circuit's reasoning, as exclusively directed to the financial interests of the newsletter's subscribers, and because it is presumably disseminated by the newsletter for profit, would be deemed commercial speech.<sup>4</sup>

<sup>4</sup> The list of newsletters potentially subject to being deemed commercial speech under the Ninth Circuit's formulation is lengthy. *Random Lengths* is a weekly newsletter that publishes data on the current price of numerous types of lumber around the nation, along with analysis of the lumber market. See, e.g., *OSB Output Likely to Top Plywood*, *Random Lengths*, June 18, 1999, at 1. Progressive Business Publications publishes some 22 newsletters concerned primarily with ways to better manage businesses and to



The consequences of such a reformulation of the commercial speech doctrine would not be limited to newsletters. If United Reporting's speech is deemed commercial because it sells information that facilitates the business activities of its subscribers, then virtually every daily newspaper in the nation—each of which sells raw data on the movement of stock prices, along with intelligence on the fluctuations of the market, in every issue—is subject to the same classification. No rational interpretation of this Court's commercial speech jurisprudence can support such a result. "Whatever else the category of commercial speech may encompass" beyond that which does no more than propose a commercial transaction, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985), this Court should not permit expansion of its boundaries by mere *ipse dixit*.<sup>5</sup>

increase their bottom lines. Included as regular features in most of this publisher's newsletters are lists of data concerning companies that have been cited for violation of state or federal laws pertinent to the particular industry covered. See, e.g., *Roundup of Recent Wage-Hour Violations and Sanctions*, Keep up to Date on Payroll, June 18, 1999, at 4; *Roundup of Most Recent OSHA Citations for Safety Violations*, Safety Compliance Alert, June 16, 1999, at 4; *Who Got Fined—And Why*, Clean Air News, June 21, 1999, at 4; *Who Got Fined*, Environmental Compliance Alert, June 28, 1999, at 1-2. By the same token, *Guidepoints: Acupuncture in Recovery* is a monthly newsletter that features, among reports concerning this medical practice, a list of the contact names and addresses for third persons or organizations who might wish to hire acupuncturists. See, e.g., *Funding Whiffs*, *Guidepoints: Acupuncture in Recovery*, June 1999, at 8 (listing contact persons at courts receiving grants to support "drug courts" that might be interested in employing alternative therapies).

<sup>5</sup> From what appears in the record, this case apparently could have been resolved by the courts below on the basis that United Reporting is engaged in activities with a "journalistic purpose" and, as such, is entitled to access to the information at issue under the express language of the statute. See Cal. Gov't Code § 6254(f)(3). Certainly, it cannot be gainsaid that newsletters and their reporters

Finally, the Ninth Circuit's error is compounded by its failure to distinguish between United Reporting's speech and the speech in which its customers may thereafter engage. Thus, for example, the United States, appearing as *amicus curiae*, contends that "[a]ddresses from arrest records are valuable to respondent (and its clients) not primarily because of their own intrinsic speech value—any fact or idea that they themselves convey—but rather because they can be used to find a particular target audience that respondent's clients want to contact." Brief for the United States as *Amicus Curiae* Supporting Petitioner at 15 (emphasis added).

While it may be true that those who subscribe to United Reporting's newsletter and ancillary information service do so at least in part because the information conveyed to them will enhance their capability to reach a particular target audience, that fact should not deprive United Reporting of the full measure of First Amendment protections to which it is otherwise entitled. This Court has never suggested that speech is deserving of lesser constitutional protection simply because the recipient may utilize it in order to further his or her commercial interests, and the consequences of such a proposition would be profound. Much of the daily grist of the nation's news—from reports on the latest economic indicators, to the political machinations of Congress and state legislatures, to developments in foreign affairs—is routinely utilized by businesses, professionals and consumers alike to facilitate and inform their decisionmaking regarding commercial transactions. The proposition that news organizations that disseminate such information are thereby entitled to a lesser degree of con-

are entitled to access to this state-controlled information on the same basis as their counterparts at daily newspapers and other press organizations. See *Lowe v. S.E.C.*, 472 U.S. 181, 205 (1985); *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

stitutional protection than that historically afforded the press cannot be squared with this Court's First Amendment jurisprudence. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. at 513 (where consumer protection organization published critical review of new stereo loudspeaker in order to aid consumers when purchasing such equipment, speech "fit[] easily within the breathing space that gives life to the First Amendment" and publisher was entitled to invoke full limits "of the First Amendment's broad protective umbrella").

**B. Newsletters Serve A Vital Informational Role And Have Without Exception Been Deemed By The Courts To Enjoy The Full Protections Of The First Amendment**

Even brief consideration of the nature of newsletters as a class of periodicals serves to underscore the constitutionally unacceptable results that follow from the Ninth Circuit's reasoning. Newsletters are distinguished as a form of publication that provides information, commentary and analysis concerning a defined area of interest to subscribers in a timely and comprehensible fashion. While the diminutive phrase "newsletter" might be misconstrued to suggest that such publications are somehow less significant than daily newspapers or other publications of more general subject matter, the distinguished history of newsletter journalism readily dispels such a characterization. Because they typically limit their coverage to a particular industry, a specific aspect of governmental activity, or a single issue of common concern to their readership, newsletter publishers thereby develop unusual expertise in their area of coverage and commonly have broken major news stories in advance of larger, more visible news organizations.

Examples abound. A newsletter focused on the defense industry first reported the story that computer hackers had

penetrated the computer systems of the Air Force and Navy during a build-up of forces in the Persian Gulf. *See Pentagon Looks for Answers to Massive Computer Attack*, Defense Information & Electronics Report, Feb. 13, 1998, at 1. Only after the newsletter had published its report did the daily print and television news organizations learn of this significant event affecting the nation's security. *See, e.g.,* Susanne M. Schafer, *Hackers Attack Computer at the Pentagon*, The Associated Press, Feb. 25, 1998; Bradley Graham, *11 U.S. Military Computer Systems Breached By Hackers This Month*, Wash. Post, Feb. 26, 1998, at A1.

Similarly, a controversial doctor's questionable methods of conducting human studies of "alternative" cancer therapies were first brought to light in a medical newsletter. *See The Antineoplaston Anomaly: How a Drug Was Used For Decades in Thousands of Patients, With No Safety, Efficacy Data*, The Cancer Letter, Sept. 25, 1998, at 1. Only after *The Cancer Letter* published its report did the general press recognize the significance of the story. *See, e.g.,* Terri Langford, *Oncologists Criticize Methods of Controversial Cancer Treatment*, The Associated Press, Oct. 1, 1998 (citing "the Sept. 25 issue of The Cancer Letter, a widely read and well-respected Washington newsletter"); Shannon Brownlee, *Trial of a Cancer Doc*, U.S. News & World Report, Oct. 5, 1998, at 28, 30 (citing The Cancer Letter's report). And, just last month, Mealey Publications, Inc. was the first to report that GTE Corp. is seeking to force its insurers to cover some \$400 million in costs associated with Year 2000 computer problems. *GTE Sues 5 Insurers to Recover \$400 Million in Y2K Remediation Costs*, Mealey's Year 2000 Report Bulletin, June 30, 1999, at 1. The rest of the press followed Mealey's lead. *See, e.g.,* Barnaby J. Feder, *GTE Sues 5*



*Insurers in a Bid to Spread Year 2000 Costs*, N.Y. Times, July 2, 1999, at C2.<sup>6</sup>

United Reporting's publication, the *Register*, is a typical example of a newsletter: It provides timely information and commentary concerning a specialized area of interest, in this case, law enforcement techniques and strategies for defending against certain types of criminal charges. See, e.g., ER 195-202. The value of the *Register* to its readers is enhanced by the inclusion of data useful to them, including the addresses of persons recently arrested for certain crimes. ER 198, 202. Countless newsletters publish similar information: The *Risk Retention Reporter*, for example, publishes contact information for purveyors and consumers of insurance products, some of which it gleans from government records. *Gas Daily* publishes

<sup>6</sup> See also, e.g., *Marketer Said to Renege; Midwest Prices Skyrocket*, Megawatt Daily, June 24, 1998, at 1 (newsletter focused on electric power utilities first reported story that electric power marketer was defaulting on contracts to deliver electricity to municipalities and other customers during Midwestern heat wave, ultimately driving the wholesale price of electricity up more than a hundred-fold); *OMB Director Raines Received Generous Concessions From Fannie Mae Board as He was Departing GSE*, Inside Mortgage Finance, Apr. 25, 1997, at 10 (newsletter covering mortgage financing business first reported story that Fannie Mae Vice Chairman Franklin D. Raines had received extraordinarily generous severance package when he left to head Clinton Administration's Office of Management and Budget, and that Fannie Mae had omitted his compensation package from its annual report); *Bonuses Given to Officers of PBS, Exceeding Federal Salary Cap*, Communications Daily, Dec. 24, 1997, at 3 (newsletter on telecommunications industry learned through investigative reporting that certain public broadcasting executives were receiving compensation in excess of statutory maximum, and major news organizations followed its reportorial lead. see, e.g., Paul Farhi, *House Panel Probing Salaries at NPR, PBS*, Wash. Post, Mar. 3, 1998, at C1; *Panel Eyes NPR, PBS Salaries*, Boston Globe, Mar. 3, 1998, at E8; Christopher Stern, *Congress Checks Big Bonus Report*, Variety, Feb. 3, 1998 (citing Communications Daily report)).

tables of pricing data for natural gas. And, like United Reporting, many newsletters offer ancillary information services through which subscribers can purchase additional, broader or more detailed data than is included in a particular issue of the newsletter. Rockville, Maryland-based UCG, for example, publishes close to 100 newsletters on topics ranging from energy (*Oil Express*, which provides petroleum marketing intelligence) to telecommunications (the *Buyer's Guide to ISDN*, which provides information intended to help businesses select and install communications equipment) to day care (*Day Care USA*, which provides information on federal grants available to operators of day care centers). UCG also offers numerous ancillary data services to its customers, including "CBD Online," a comprehensive listing of federal contracts and awards, and "TECOR OnLine," through which it provides customized listings of environmental-related contract opportunities. The information disseminated by UCG, like that disseminated by United Reporting, is culled largely from government records and UCG's ancillary information services are no different in kind from that provided here by United Reporting: Such services provide to subscribers information that those subscribers may, in turn, use to further their business or financial interests. Indeed, as Petitioner itself concedes, "the dissemination of information is the modus operandi of United Reporting and similar organizations." Brief for the Petitioner at 36.

This and other courts have long recognized that speakers who seek payment for their speech—the *sine qua non* of virtually all news organizations—do not thereby sacrifice their First Amendment rights. See, e.g., *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("Of course, the degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away."); *Murdock v.*



*Pennsylvania*, 319 U.S. 105, 111 (1943) ("the mere fact that . . . religious literature is 'sold' . . . rather than 'donated' does not transform evangelism into a commercial enterprise"). Indeed, courts repeatedly have recognized that it is improper to afford a reduced level of constitutional protection to specialized publications on this basis. See, e.g., *S.E.C. v. Wall Street Publ'g Inst., Inc.*, 851 F.2d 365, 372 (D.C. Cir. 1988) ("we do not see a clear fit between the commercial speech doctrine and the [stock market] publications that the SEC here seeks to regulate"); *In re Scott Paper Co. Sec. Litig.*, 145 F.R.D. 366, 368 (E.D. Pa. 1992) (rejecting argument that Standard & Poor's credit rating circular "is not a member of the traditional newsgathering and information disseminating community" entitled to full First Amendment protection); *Citicorp v. Interbank Card Ass'n*, 4 Media L. Rep. (BNA) 1429, 1431 (S.D.N.Y. 1978) (rejecting argument that specialized financial publisher was "not entitled to any special protected status").

It is well established that the publishing activities in which newsletter publishers like United Reporting typically engage (as distinct from advertisements they may publish soliciting persons to pay for the published products) should be understood as fully protected by the First Amendment. This Court's reasoning in *Lowe v. S.E.C.*, 472 U.S. 181 (1985), a case that concerned a statutory privilege for members of the press, is illustrative. There, the petitioners "publish[ed] two investment newsletters and solicit[ed] subscriptions for a stock-chart service." *Id.* at 184. The SEC alleged in its complaint that the publisher was "engaged in the business of advising others 'as to the advisability of investing in, purchasing, or selling securities . . . and as part of a regular business . . . issuing reports concerning securities'" without having registered with the Commission to do so, in violation of

securities laws. *Id.* (quoting complaint) (alterations in original). The Second Circuit rejected the publisher's assertion that it was entitled to the full panoply of First Amendment rights, holding that his newsletters constituted "potentially deceptive commercial speech," *S.E.C. v. Lowe*, 725 F.2d 892, 901 (2d Cir. 1984) (emphasis added), and observing that the case involved "precisely the kind of regulation of commercial activity permissible under the First Amendment," *id.* at 900 (emphasis added). This Court reversed.

In holding that the registration requirements of the Investment Advisors Act of 1940 did not apply to the publisher, the Court noted that "[p]etitioners' newsletters are distributed 'for compensation and as part of a regular business' and they contain 'analyses or reports concerning securities.'" *Lowe v. S.E.C.*, 472 U.S. at 203 (citation omitted). Nevertheless, this Court concluded that the newsletters and stock-chart service at issue qualified for an exemption from the registration requirements as "bona fide newspaper[s], news magazine[s], or business or financial publication[s]," invoking the Court's oft-repeated observation:

"The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."

*Id.* at 205 (emphasis added) (quoting *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938) (citing *Near v. Minnesota*, 283 U.S. 697, 713-16 (1931))); see also, e.g., *Branzburg v. Hayes*, 408 U.S. at 704 (informative role played by press is fulfilled by "[t]he lonely pamphleteer

who uses carbon paper or mimeograph just as much as . . . the large metropolitan publisher").

The Court held in *Lowe* that the respondent was *not* engaged in unprotected speech, but, rather, fit comfortably within the concept of the "press":

To the extent that the chart service contains factual information about past transactions and market trends, and the newsletters contain commentary on general market conditions, there can be no doubt about the protected character of the communications

. . . .

*Id.* at 210.

What this Court said of the statutory protection available to the newsletters at issue in *Lowe* applies with equal force to the constitutional protection at issue here. See *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986). In *Pacific Gas*, a California utility published a newsletter, entitled *Progress*, that it distributed to its gas and electric customers. Although it also included political editorials and feature stories on matters of general interest, one purpose of the newsletter was to provide commercial information to the utility's customers, including, for example, information about special payment plans it offered. *Id.* at 5 & n.1. Justice Powell, writing for himself, Chief Justice Burger and Justices O'Connor and Brennan, observed:

There is no doubt that . . . appellant's newsletter *Progress* receives the full protection of the First Amendment. In appearance no different from a small newspaper, *Progress'* contents range from energy-saving tips to stories about wildlife conservation, and from billing information to recipes. *Progress* thus extends well beyond speech that proposes a business transaction, and includes the kind of discussion of

"matters of public concern" that the First Amendment both fully protects and implicitly encourages.

*Id.* at 8-9 (Powell, J., announcing judgment) (citations omitted) (emphasis added).

Indeed, the lower courts repeatedly have afforded newsletters the full measure of protection derived from the First Amendment. See *Lind v. Grimmer*, 30 F.3d 1115, 1117-19 (9th Cir. 1994) (concluding that newsletter constituted "fully protected speech" and applying strict First Amendment scrutiny to statute that purported to limit information publisher could disseminate); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 707-08 (4th Cir. 1991) (newsletter reporting on toxic chemicals entitled to full constitutional protection); *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 7-8 (2d Cir. 1982) (newsletter dedicated exclusively to coverage of prices in petroleum industry entitled to assert First Amendment-based privilege against compelled disclosure of information it had gathered); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980) (newsletter reporting on marketing policies of supermarket industry entitled to full First Amendment protection).<sup>7</sup>

<sup>7</sup> See also, e.g., *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 25 F. Supp. 2d 837, 840 n.4 (N.D. Ill. 1998) (organization that published newsletter conveying information to hemophiliacs about blood products was entitled to assert First Amendment-based defenses to claims based on content of newsletter); *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1304, 1314 (W.D. Mich. 1996) (publisher of newsletter that disseminated data about white supremacist groups entitled to privilege afforded by First Amendment against compelled disclosure of confidential sources); *Ginsburg v. Agora, Inc.*, 915 F. Supp. 733, 739-40 (D. Md. 1995) (although newsletter may be less recognized and may have smaller circulation than larger publications, it nevertheless is subject to same protection under First Amendment); *National Life Ins. Co. v. Phillips Publ'g, Inc.*, 793 F. Supp. at 648 (newsletter directed at financial interests of subscribers entitled to assert First Amend-



In the final analysis, United Reporting's newsletter and ancillary service, which provide information concerning the operations of law enforcement and those who have come into the criminal justice system, are no less entitled to the First Amendment's protections than is any member of the "press." See, e.g., *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (reports concerning law enforcement and those responsible for administering that system provide both the raw material and a catalyst for the "free discussion of governmental affairs") (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783

ment-based defenses in defamation action); *S.E.C. v. Hirsch*, 8 Media L. Rep. (BNA) 2421, 2422 (S.D.N.Y. 1982) (financial newsletter entitled to First Amendment-based privilege against compelled disclosure of subpoenaed material); *F.E.C. v. Phillips Publ'g, Inc.*, 517 F. Supp. 1308, 1309, 1312-13 (D.D.C. 1981) (treating newsletters as "press" publications for purposes of exemption from regulatory statute); *Concerned Consumers League v. O'Neill*, 371 F. Supp. 644, 652 (E.D. Wis. 1974) (newsletter, like any newspaper, "is safeguarded by the First Amendment of the Federal Constitution relating to freedom of the press"); *Oregon v. Nachtigal*, 921 P.2d 1304, 1307-08 (Or. 1996) (publisher of newsletter reporting on financial aspects of sporting goods industry entitled to peremptory writ striking down prior restraint on publication); *Morning Star, Inc. v. Superior Court*, 29 Cal. Rptr. 2d 547, 553-58 (Ct. App. 1994) (financial newsletter entitled to assert full range of protections available under First Amendment); *In re Burnett*, 635 A.2d 1019 (N.J. Super. Ct. Law Div. 1993) (First Amendment applies to newsletter reporting on insurance management issues); *Moffatt v. Brown*, 751 P.2d 939, 941-42 (Alaska 1988) (publisher of allegedly defamatory newsletter entitled to assert full range of First Amendment protections); *In re Photo Marketing Ass'n Int'l*, 327 N.W.2d 515, 517 (Mich. Ct. App. 1982) ("the mere fact that a publication is technical in nature does not preclude the application of the First Amendment privilege against disclosure of confidential information"); *Tague v. Citizens for Law & Order, Inc.*, 142 Cal. Rptr. 689, 690 (App. Dep't Super. Ct. 1977) (noting "fundamental interests" implicated by libel suit against newsletter and permitting publisher to assert full range of constitutional defenses to defamation claim).

(1978) ("the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit the government from limiting the stock of information from which members of the public may draw"); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92 (1975) (American public "relies necessarily upon the press" to report on operation of government and "[g]reat responsibility is accordingly placed upon the news media" to fulfill this role); *Adey v. United Action for Animals, Inc.*, 361 F. Supp. 457 (S.D.N.Y. 1973) (fact that newsletter's circulation was limited to members of association with common interest in subject did not deprive newsletter of First Amendment protection), *aff'd*, 493 F.2d 1397 (2d Cir. 1974).

If a state or federal government seeks to prevent attorneys, drug counselors, and other citizens from communicating directly with recent arrestees, as the State of California here claims it does, then the proper course is for the government to enact laws restricting those communications directly, if it can do so consistently with the Constitution, and not to restrict the speech of United Reporting or other publishers engaged in the dissemination to the public of information that serves a far different purpose than merely proposing a commercial transaction.



**CONCLUSION**

For the foregoing reasons, the NPA respectfully submits that the judgment in favor of United Reporting should be affirmed, but that the constitutionally deficient reasoning adopted by the Court of Appeals should be rejected.

Respectfully submitted,

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⑨  
No. 98-678

Supreme Court, U.S.

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**IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term 1998**

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Los Angeles Police Department,

*Petitioner,*

v.

United Reporting Publishing Corp.,

*Respondent.*

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**On Writ of Certiorari to the United States  
Court of Appeals For the Ninth Circuit**

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**BRIEF OF THE  
INDIVIDUAL REFERENCE SERVICES GROUP AND  
THE SOFTWARE & INFORMATION INDUSTRY  
ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF  
RESPONDENT**

---

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## QUESTION PRESENTED

Whether government, consistent with the First and Fourteenth Amendments, may on grounds of privacy discriminate in revealing public record information based upon the requester's expressive use of the information, even though the government allows the same information to be published in any newspaper, and to be obtained by any licensed private investigator or political operative, scholar or government official.



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**INTEREST OF AMICI**

The position urged by the Petitioner in this case—that government may, in the name of protecting privacy, discriminate against and selectively restrict expression using information contained in arrest records on the basis of its content or commercial purpose—could extend to the dissemination of information contained in virtually all public records. *Amici*,<sup>1</sup> whose members include LEXIS-NEXIS and West Group, offer public record information services. They use public record information, not for purposes of solicitation, but instead to communicate the information to their subscribers. The sort of regime at issue in this case has a serious, discriminatory effect on public record information services, placing them at a decided disadvantage vis-à-vis others, including competitors such as the media and private investigators, who are favored under the statutory scheme.

The Individual Reference Services Group ("IRSG") represents 13 leading information industry companies that provide commercial information services to help identify, verify information about, or locate individuals. See <http://www.irsg.org>. In providing their services, IRSG members draw upon public record information. Address information from public records is an important tool for preventing the misidentification of individuals. This is particularly true of records about events such as arrests.

Public record information services often provide faster access to that information in formats demanded in the market, combine it with information from various other sources for quick reference, assure its reliability and integrity, and offer customer support and other assistance in

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<sup>1</sup> Written consent of both parties to the filing of this brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37. Neither party wrote any part of this brief or contributed to its financial support.

using the information. These services bring more information by and about government to more members of the public every day, so that a central goal of effective democracy—an informed citizenry—can be achieved.

These services play an important role in facilitating law enforcement, fraud prevention and detection, and a range of business transactions and legal proceedings. A wide variety of businesses and institutions rely on access to public records through these services. For example, members of the legal community have long used databases of public record information to locate heirs and assets, enforce judgments, conduct “due diligence” in connection with company mergers, and serve parties and witnesses.

Although the vast majority of IRSG member companies do not compile or use arrest information, a few obtain such information from certain states for use for employment screening of, for example, school bus drivers, child care workers, and nursing home orderlies. The Fair Credit Reporting Act and related state laws govern the use of arrest information for such purposes, by, *inter alia*, requiring a subject’s written consent to the release of the information and requiring the reporting company to help ensure that such information is complete and up to date. See, e.g., 15 U.S.C. §§ 1681b(b)(2)(B), 1681k(2).

The Software & Information Industry Association (“SIIA”) represents 1,400 members throughout the United States and around the world. See <http://www.siiia.net>. SIIA member companies develop products and services for education, home, corporate and Internet markets, encompassing the entire spectrum of the software code and information content markets.

Many SIIA member companies acquire information from government sources and incorporate it into their products and services. SIIA is a leading voice in debate about private sector distribution of government-held information. SIIA opposes governmental efforts to deny access, discriminate in

providing access, or impose restrictions upon the public’s use of government-held information collected and maintained at taxpayer expense. SIIA strongly supported enactment of the information dissemination provisions of the Paperwork Reduction Act of 1995, which clearly state the federal government’s policy of widely disseminating public information in a nondiscriminatory manner and without restrictions on its use. See infra n.10.

The IRSG and SIIA are interested in this case because Petitioner and its *amici* ask the Court to alter fundamental principles of open records law upon which their member companies have long relied in developing their businesses, investing hundreds of millions of dollars to provide customers with access to this information. The outcome of this case may affect the continued availability of public record information services for a variety of socially beneficial purposes discussed in Section III *infra*.

### STATEMENT OF THE CASE

The California statute at issue in this case, section 6254 of the California Government Code, directs that all information about an arrestee contained in an arrest record other than his or her address must be disclosed, CAL. GOV’T CODE § 6254(f)(1) (Deering 1999), allowing any casual observer to obtain the arrestees’ names, physical description and details of their alleged crimes. It authorizes state, local, and federal officials to obtain an arrestee’s address without regard to whether they subsequently publicly disclose it. See § 6254(f)(3).

Moreover, the statute contains several major exceptions under which members of the public may obtain and widely disseminate address information from arrest records. As the Ninth Circuit noted, the media are at liberty to place address information together with the arrestee’s name and alleged crime on the front page of any newspaper or magazine, or simply to republish it along with a long list of other arrest



records. See United Reporting Publ'g Corp. v. Lungren, 146 F.3d 1133, 1140 (9<sup>th</sup> Cir. 1998). The statute specifically authorizes a further use incompatible with the privacy of this information, permitting any licensed private investigator to obtain the information for any investigative purpose. Finally, it provides yet another exception for scholars and political operatives to obtain and disseminate this information in publications, press statements and databases as long as they do not use it to sell any other product or service. See § 6254(f)(3).

Under this regime, even address information from arrest records is by no means private. Indeed, instead of protecting the privacy of these arrestees, the statutory regime selectively but fundamentally undermines it, while substantially increasing the risk that citizens with common names will be misidentified as having been arrested.

### SUMMARY OF THE ARGUMENT

As all the federal courts of appeals have correctly concluded, the sort of regime imposed section 6254(f)(3) is a restriction on expression that is subject to heightened First Amendment scrutiny. The statute on its face restricts expression using public record information, and both the statute's legislative history and concessions of the Petitioner and its *amici* confirm that this was the principal purpose for adopting the restriction. The government's characterization of section 6254(f)(3) as a denial of access statute rings hollow. As numerous courts below have concluded, government cannot escape heightened First Amendment scrutiny through the simple formalism of re-framing its discriminatory suppression of speech using public record information as an access restriction.

The position asserted by the government in this case would give government broad powers that are antithetical to the First Amendment. First, government would be empowered substantially to reduce both commercial and

non-commercial speech directed to individuals who have been the subject of government action. Second, government would receive a monopoly over important information about the workings of government, reducing competition from other speakers. Finally, by giving the government control over subsequent uses of public record information by requesters and other users, the position would effectively overturn the long-standing American rule that government does not have a copyright in public record information.

Section 6254(f)(3) cannot be redeemed as a permissible subsidy decision because the record provides no support for this analogy. On the contrary, it reveals that California and its localities may, and often do, charge for copies of their arrest records.

Even if this Court were to consider section 6254(f)(3) an access restriction rather than a use restriction, the statute still would be unconstitutional. There is a constitutional right of access to arrest records, as *amicus* Investigative Reporters and Editors, Inc. clearly demonstrates. Moreover, with regard to public record information generally, Petitioner and its *amici* in fact propose a major and quite dangerous expansion of the decisions of this Court regarding access to non-public government information upon which they rely. These cases all concerned requests for special, enhanced rights of access (exceptions to a rule of general applicability), rather than a law targeting particular uses for disfavored treatment by denying access. Thus, this Court may rule for Respondent without disturbing either Houchins v. KQED on the one hand or Rust v. Sullivan on the other.

Section 6254(f)(3) is so riddled with exceptions and inconsistencies reflecting the state's decidedly equivocal policy toward protecting the privacy of arrest information that it cannot survive First Amendment scrutiny as a content-based restriction either on commercial or non-commercial speech. Section 6254(f)(3) fails as a content-based restriction because it allows dissemination of arrestee

addresses only for favored forms of non-commercial speech, but not for others. Its restriction not only prevents solicitation, but also prohibits communication of the underlying information unless for a statutory purpose. The statute is plainly not narrowly tailored to serve its goal. Nor does it materially and directly advance privacy, the interest that the government invokes to defend the statute. Indeed, disclosures to the media, licensed private investigators, political operatives, and government officials, intrude upon an arrestee's privacy as much as, or more, than disclosures to others. The statute's discrimination against other speakers conveying virtually identical information distorts the marketplace, and offends the First Amendment.

The major statutory exemptions and inconsistencies, coupled with the availability of other regulatory options that would have advanced the stated interest in a manner less intrusive of First Amendment rights, leave no basis for upholding section 6254(f)(3) as a content-based restriction on either commercial or non-commercial speech.

Finally, this Court should be careful not to sacrifice the important benefits provided by public record information services by accepting Petitioner's suggestion that expression using public record information obtained from the government is not subject to First Amendment protection. Public record information services play a role very similar to that of traditional media in disseminating public record information, and enjoy the same First Amendment protections. Moreover, these services provide significant societal benefits. For all these reasons, this Court should reject any broad rule eliminating constitutional protection for expression using public records.

## ARGUMENT

### I. SECTION 6254(f)(3) MUST BE SUBJECTED TO HEIGHTENED FIRST AMENDMENT SCRUTINY.

#### A. Denying Access to Public Records Based on the Requester's Intended Expressive Use Is a Use, Not an Access, Restriction.

Restrictions that discriminate in access to public record information based on the content of the expression for which recipients will use that information require heightened scrutiny under the First and Fourteenth Amendments.

On its face, section 6254(f)(3) operates as a two-tiered use restriction. First, it allows use of address information only by individuals who have one of a defined set of "purposes" for using the information. Second, it requires these individuals to sign a statement under penalty of perjury pledging that the information in the records will not be used directly or indirectly by these individuals or others to whom they may transfer the information "to sell a product or service to any individual." *Id.*

This type of restriction on use of public record information denies members of the *amici* IRSG and SIIA an essential element of public record information that is linked reliably to the names of individuals in public records only at the government source. Such restrictions operate against them even though the approved users of the information—including the media and private investigators—may use the information for purposes identical or similar to those of *amici's* members by providing it to the public for a fee.<sup>2</sup>

<sup>2</sup> In fact, the media and private investigators are significant customers of *amici's* members. With regard to these customers, statutes such as section 6254(f)(3) have the unusual effect of allowing these end users to obtain the public record information directly from the government, but prohibiting public record information services from supplying the very same information to them.



1. The Federal Courts of Appeals Have All Agreed that Such Statutes Are Use Restrictions Subject to Heightened First Amendment Scrutiny

Section 6254(f)(3) is an unconstitutional restriction on the use for expressive purposes of information derived from public records. Every federal court of appeals that has reviewed similar arrest record statutes has treated them as use restrictions on commercial speech. The Fifth, Sixth, Tenth, and Eleventh Circuits all agreed with the Ninth Circuit on this,<sup>3</sup> and in the court below Petitioner itself agreed that this test should apply. Indeed, even the circuit conflict relied upon in the petition for *certiorari* concerned the proper application of the commercial speech doctrine, not Petitioner's assertion that heightened scrutiny does not apply at all.<sup>4</sup> Although the restriction at issue is in fact a content-based restriction on both commercial and non-commercial expression, see Section II *infra*, these authorities demonstrate that heightened scrutiny must apply to section 6254(f)(3).

Petitioner and its *amici* labor to protect section 6254(f)(3)'s tortured restriction on expression containing information derived from public records by characterizing it as a simple restriction on access to those records. However, the statute is obviously aimed at restricting use of, not access to, the information in question. This is apparent from the plain language of the statute, from its legislative history, and from admissions in petitioner's and its *amici*'s briefs.

<sup>3</sup> See *Innovative Database Systems v. Morales*, 990 F.2d 217 (5<sup>th</sup> Cir. 1993); *Amelkin v. McClure*, 168 F.3d 893 (6<sup>th</sup> Cir. 1999); *United Reporting*, 146 F.3d 1133 (9<sup>th</sup> Cir. 1998); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10<sup>th</sup> Cir. 1994), *cert. denied*, 513 U.S. 1044 (1994); *Statewide Detective Agency v. Miller*, 115 F.3d 904 (11<sup>th</sup> Cir. 1997); *Speer v. Miller*, 15 F.3d 1007 (11<sup>th</sup> Cir. 1994). Moreover, not a single judge on any of these panels disagreed with this conclusion.

<sup>4</sup> Petition for *Certiorari* at 7-8. See *United Reporting*, 146 F.3d at 1136; *Lanphere & Urbaniak*, 21 F.3d at 1513.

As noted above, on its face, section 6254(f)(3) operates as a two-tiered use restriction. The committee reports for California Senate Bill 1059 confirm that the drafters of section 6254(f) sought to stop use of arrestee address information for purposes of solicitation. See, e.g., Joint Appendix at 11. Furthermore, Petitioner and *amici* Attorneys General concede that the statute is a use restriction. See Pet. Br. at 13 (the statute "simply limits the use of the information"); Br. of States of New York *et al.* at 22 (section 6254(f)(3) "targets . . . use of address information in bulk for solicitation of arrestees").

Thus, a principal purpose of section 6254 is undeniably to suppress speech—in the form of commercial and non-commercial solicitation. See *United Reporting*, 146 F.3d at 1139 (instead of protecting the privacy of arrestees, the statute "appears to be more directed at preventing solicitation practices").<sup>5</sup> Indeed, the statute is an attempt to achieve by other means what the Kentucky Bar was unable to achieve in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988). Petitioner and its *amici* readily acknowledge this purpose in their briefs. See Pet. Br. at 36-37; Br. of the States of New York *et al.* at 14-24. The government cannot escape heightened First Amendment scrutiny simply by re-framing its suppression of speech using public record information as an access restriction. See, e.g., *United Reporting Publ'g Corp. v. Lungren*, 946 F. Supp. 822, 825 (S.D. Cal. 1996) (concluding upon review of the record that "[t]he government cannot denominate this a limitation on access in order to achieve a limitation on non-preferred speech").

Federal courts of appeals confronted with very similar statutes have had no difficulty concluding that they were use, not access, restrictions. For example, the Colorado statute at issue in *Lanphere & Urbaniak* contained a very similar

<sup>5</sup> The other justification, administrative burden, has been waived by petitioners. See *United Reporting*, 146 F.3d at 1138 n.3.



requirement of a signed statement affirming that the records "shall not be used for the direct solicitation of business for pecuniary gain." 21 F.3d at 1511. Colorado argued, as do the Petitioner and its *amici*, that because the statute functioned by denying users access to records based upon the requester's intended use, it should not be subject to heightened First Amendment scrutiny. The Tenth Circuit rejected this argument, concluding instead that "the Colorado Legislature has drawn a regulatory line based on *speech use* of [arrest] records," *id.* at 1513, and that the law must survive scrutiny under the Central Hudson<sup>6</sup> test. Accord Amelkin v. McClure, 168 F.3d at 897 (rejecting Kentucky's argument that a similar restriction was "a pure denial of access statute" and applying heightened scrutiny).

FEC v. International Funding Inst., 969 F.2d 1110 (D.C. Cir. 1992) (en banc), relied upon by the Solicitor General, Br. of the United States at 19-20, 22-23, is not to the contrary. First, that case assumed that intermediate scrutiny applies to restrictions on solicitation using the particular records in question. *Id.* at 1114, 1116. More importantly, the result in International Funding Inst. hinged upon the fact that access to FEC contributor lists for solicitation purposes would have distorted the marketplace by allowing companies to exploit without charge the work of competitors who filed reports containing their fundraising lists. *See id.* at 1119-20 (Buckley, J., concurring). By contrast, as discussed more fully below, section 6254(f)(3) itself distorts the marketplace by bestowing unique benefits on certain competitors that undermine, rather than advance, the stated government interest. As Judge Randolph's concurring opinion suggests, a statute that instead "place[s] restrictions on the use of information the government itself has generated and released

<sup>6</sup> Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 566 (1980).

to the public," presents a very different case. *Id.* at 1121 (Randolph, J., concurring).

## 2. Indirect Content-Based Restrictions Are Not Subject to Minimal First Amendment Scrutiny

Petitioner's and the Solicitor General's contentions that standard First Amendment doctrines do not apply because section 6254(f)(3) operates as an indirect restriction on expression must likewise be rejected. This Court has repeatedly struck down restrictions on First Amendment freedoms even where they operate indirectly.<sup>7</sup>

Nor have these cases been limited to restrictions on non-commercial speech. For example, City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993), invalidated a selective prohibition on placing newsracks for commercial publications on city property. The restriction operated indirectly: it was limited to expression disseminated using city property, and did not restrict dissemination through means other than newsracks or in other venues. Similarly, this Court in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), invalidated another indirect restriction on speech—a prohibition against use of the U.S. mails for solicitations of contraceptives. *See id.* at 80 (Rehnquist, J., concurring) ("A prohibition on the use of the mails is a significant restriction of First Amendment rights.").

Cutting off use of essential source material for a non-commercial or commercial communication is every bit as significant a barrier to expression as the indirect restrictions

<sup>7</sup> *See, e.g., Waters v. Churchill*, 511 U.S. 661, 674 (1994); Minneapolis Star & Tribune v. Minn. Comm'r of Revenue, 460 U.S. 575, 592 (1983); Buckley v. Valeo, 424 U.S. 1, 58 (1976); Miami Herald v. Tornillo, 418 U.S. 241, 256 (1974); *cf. Sherbert v. Verner*, 374 U.S. 398, 404 (1963) ("If the purpose or effect of a law is to . . . discriminate . . . , the law is constitutionally invalid even though the burden may be characterized as being only indirect.").

at issue in these other cases, and should receive *at least* the same level of constitutional scrutiny.

Nor, in the specific context of use of information contained in public records, have the courts of appeals been reluctant to strike down such indirect restrictions on expression. For example, the Second Circuit in Legi-Tech v. Keiper, 766 F.2d 728 (1985), held that providing preferential access to legislative materials to a governmental legislative information service violated the First Amendment rights of a competing service. *Id.* at 733. Similarly, the Tenth Circuit in Lanphere & Urbaniak expressly rejected the notion that a similar public record use restriction was sheltered from heightened First Amendment scrutiny because it “only indirectly burden[ed] speech.” 21 F.3d at 1515 n.5.

Petitioner’s theory that an indirect restriction on speech “borders on the ethereal,” Pet. Br. at 14, and is no restriction at all, is abhorrent to the First Amendment. It would give the government virtually unlimited power to control expression regarding government operations that use public records.

The United States’ theory that such restrictions are invalid only if viewpoint-based, Br. of United States at 22-24, also must be rejected. A restriction on use of public record information has far more than “an incidental effect” on expression. *See id.* at 22. The government is the only source for this information and has a monopoly on address information linked to the name of the arrestee, which is critical both to confirming the identity of an arrestee with a common name and to communicating with arrestees for purposes discussed in Section II A. of Respondent’s brief.

The United States’ theory would give the government broad power to control and manipulate use of information about the workings of government. Such power is repugnant to the First Amendment. Under this theory the government could impose any non-viewpoint-based restriction it wished on use of public record information.

In this case, California has required disclosure to, and favored speech by, certain speakers in the marketplace. It has established an oligopoly of speakers to whom someone interested in verifying the address of an arrestee or communicating with an arrestee for purposes other than solicitation must turn. Those who wish to obtain the information must either purchase one of the newspapers, such as the Sacramento Bee, that publish arrestee names and addresses or must hire a licensed private investigator to obtain it for them. They may not, however, obtain the information themselves or use a public record information service to obtain it. This sort of regime does little or nothing to promote privacy. It simply channels information into one stream by blocking its flow through another, *cf. Greater New Orleans Broad. Ass’n v. United States*, 119 S. Ct. 1923, 1932-33 (1999) (noting similar channeling effect of selective advertising ban), and enriches the media and licensed private investigators,<sup>8</sup> while delaying access to the information and raising the cost of obtaining it in the many jurisdictions where the press does not publish the information for free.

Furthermore, this rule would allow the government to do what it has attempted in this case—substantially to reduce both commercial and non-commercial speech directed to individuals who have been the subject of government action. It would give the government the power to hold arrestees partially incommunicado, isolated from information that may be of immediate benefit to them, provided that the restriction was not viewpoint-based. Indeed, under the statute at issue, government could likely prevent speakers who had been

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<sup>8</sup> Contrary to the Solicitor General’s suggestion, nothing in the statute indicates that the access by private investigators is limited to “a presumably limited number of cases in which address information is germane to a legitimate, specifically focused private investigation.” Br. of United States at 27. The information instead is freely available for any “investigation purposes” by a licensed private investigator. § 6254(f)(3).



harmed by government action from communicating with one another for the purpose of organizing a common defense.

If this Court were to endorse this broad power, government would doubtless use it in a variety of instances to establish a monopoly over other important information about the workings of government, "control[ing] or reduc[ing] competition from other speakers." *See, e.g., Legi-Tech*, 766 F.2d at 733. As the Second Circuit noted in *Legi-Tech* when confronted with one such scheme, "The evils inherent in allowing government to create a monopoly over the dissemination of public information in any form seem too obvious to require extended discussion." *Id.*

Indeed, the power that Petitioner claims to control subsequent uses of the information by requesters and others would overturn the long-standing American rule that the government does not have a copyright in government information. *See, e.g., 17 U.S.C. § 105; Building Officials & Code Adm'rs Int'l v. Code Tech., Inc.*, 628 F.2d 730, 732-33 (1st Cir. 1980) (explaining history of rejection of copyright in government documents at common law).<sup>9</sup> It would give the government monopoly power akin to the Crown copyright doctrine under English law which deems the King or Queen the owner of the materials produced by government and can control subsequent uses of such information. As one court noted in a somewhat different context, "All monopolies are odious, and English history does not furnish an example of one more odious in principle

<sup>9</sup> Commentators have long argued that Congress may lack the constitutional authority to extend copyright protection to works of government at any level. *See, e.g.,* Henry Perritt, Jr., "Sources of Rights to Access Public Information," 4 Wm. & Mary Bill Rts. J. 179 (1995) (copyright incentives are not needed to induce the government to produce information); 1 *Nimmer on Copyright* § 5.06[B][4] (1996) (prohibiting the reproduction or distribution of governmental information on the basis of the government's copyright interest in the information would run afoul of the First Amendment).

or vexatious in practice." *In re Chambers*, 44 F. 786, 791 (D. Neb. 1891) (directing clerk of federal circuit court to make available judgment records to commercial users).<sup>10</sup>

## **B. California's Attempt Selectively to Deny Access to Address Information from Public Records is Constitutionally Infirm**

### **1. There Is a Constitutional Right of Access to Arrest Records**

As *amicus curiae* Investigative Reporters and Editors, Inc. conclusively demonstrates, the act of arresting an individual—an exercise of the most coercive sort of governmental power—is an event that falls squarely within a historical tradition of openness requiring First Amendment protection. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (recognizing a constitutional right of access to jury selection where "[p]ublic jury selection . . . was the common practice in America when the Constitution

<sup>10</sup> The monopoly power at the heart of the Petitioner's theory is anathema to the federal government's long-standing policy of open and unrestricted access to public information. Most recently, in the public dissemination provisions of the Paperwork Reduction Act of 1995 ("PRA"), Congress prohibited federal agencies in most instances from, among other practices, "establish[ing] an exclusive, restricted, or other distribution arrangement that interferes with timely and equitable availability of public information to the public" or "restrict[ing] . . . the use, resale, or redissemination of public information by the public." 44 U.S.C. § 3506(d)(4)(A)(B). *See* H.R. Rep. No. 99, 104th Cong., 1st Sess., 34 (1995) (section 3506(d)(4) "prevent[s] agencies from discriminating against or otherwise disadvantaging any class of users, particularly commercial users"). This policy has been clarified from time to time, starting in the early 19<sup>th</sup> century, *see, e.g.,* Act of August 12, 1848 ch. 166 (requiring federal judicial records to be open for inspection "without any fee or charge").

Given this long-standing federal policy of unrestricted access to public record information, it is ironic that the United States has sided with the Petitioner in arguing that California may control the public's use of public information.



was adopted"); see also *Br. of the United States* at 33 n.15 (implicitly conceding this). Furthermore, the importance of public monitoring of this tremendous power and the danger of secret arrests solidly grounds access to arrest information as a constitutionally protected right.

The summaries of the common law of open records advanced by the Petitioner and its *amici* do not pertain to arrest records and, therefore, are inapposite. Moreover, these summaries ignore that at common law the right to inspect public records was absolute. The limitations upon that right were judicial in nature and stemmed entirely from use of the writ of mandamus to vindicate the right. See, e.g., *Nowack v. Auditor General*, 219 N.W. 749 (Mich. 1928) (summarizing the history of the right to inspect public records and use of the writ as the remedy to enforce the right). This writ originally was a prerogative writ that proceeded from the King himself who sat on his court of King's bench. In time, the right to the writ was extended to private individuals, but they could not sue under the writ in their own names unless they could show some special interest to be enforced. See *id.*

The judicial rule regarding an individual's ability to sue was a restriction on a citizen's remedy, rather than on his or her right of access. See *Wellford v. Williams*, 110 Tenn. 549, 75 S.W. 948, 958 (Tenn. 1903) ("In theory the right of examination [of public records] is absolute, but in practice it is at last only a matter of discretion because . . . the right must be enforced by mandamus.") Recognizing socio-economic and other differences between England and the United States, the American judiciary modified the writ's anachronistic limitations and expanded the range of situations where courts would enforce the right to inspect public records. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978) ("In contrast to the English practice, American decisions generally do not condition enforcement of this right [to inspect and copy public records]

on a proprietary interest in the document or upon a need for it as evidence in a lawsuit.") (citations omitted).<sup>11</sup>

Accepting the government's theory would eviscerate a centuries-long tradition of access to such records, and set a dangerous precedent imperiling transparency of important government functions. See *Legi-Tech*, 766 F.2d at 733 (First Amendment violated where government denies access to create a monopoly on dissemination of government information);<sup>12</sup> see also *Houchins v. KQED*, 438 U.S. 1, 36-38 (1978) (Stevens, J., dissenting) (First Amendment prevents government from concealing from the public information about "an integral component of the criminal justice system.")

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<sup>11</sup> For example, differences between the concentration of property in England, where most realty was held in large estates by nobility and passed on intact to heirs, and its dispersion in the United States, where small holdings in fee were frequently sold and transferred, brought recognition of a wider public interest in property records. See, e.g., *In re Chambers*, 44 F. at 790 ("at common law judgments were not liens on land, and the necessity that now exists for examining the records had no existence then"); *Cole v. Rachac*, 35 N.W. 7 (Minn. 1887) (enforcing a title abstract office's request to access and copy the county's property registry records to create a commercial repository of records in part because "they are usually the only place where abstracts of title can be conveniently obtained").

<sup>12</sup> *Legi-Tech*, a database company, was correctly treated as an organ of the press in Judge Winter's opinion. Similarly, both United Reporting and members of the IRSG and SIIA perform the same communicative function in the case at hand. Their role in republishing government information cannot be distinguished from the role of the press in republishing the information. Cf. *National Sec. Archive v. United States Dep't of Defense*, 880 F.2d 1381, 1387 (1989) (entity that uses editorial discretion in compiling documents from a variety of sources and redisseminating them is a "representative of the news media" for purposes of FOIA). Such line-drawing is impermissible when entities communicate similar information. See *Greater New Orleans*, 119 S. Ct. at 1935; *First National Bank v. Bellotti*, 435 U.S. 765, 777 (1978).

2. Petitioner Proposes a Major Expansion of this Court's Precedents Restricting Rights of Access to Government Records

As noted above, Petitioner's position would give the government sweeping new authority to pick and choose which private citizens may review routine public record information and control subsequent uses of that information.

The decisions of this Court regarding access to government records cited by Petitioner are far more limited. None involved information such as arrest records, to which there is a centuries-long tradition of access. Furthermore, all concerned requests for special, enhanced rights of access that were exceptions to a rule of general applicability, rather than legislation targeting particular uses for disfavored treatment by denying access. *See, e.g., Nixon*, 435 U.S. at 609-10 (press denied access to copies of tapes to which others never had physical access); *Houchins*, 438 U.S. at 4-5 (three-justice plurality) (press denied access to prison that no one outside prison system was allowed to obtain); *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) (rejecting argument that the First Amendment provided a special exception to State Department criteria for granting passports for travel to Cuba). Such rights to special exemptions are disfavored under the First Amendment. *See Employment Div. v. Smith*, 494 U.S. 872, 879-80 (1990).

Petitioner and its *amici* in fact seek a major and quite dangerous expansion of the "no special access" principle established in the access cases upon which they rely. Indeed, Justice Stewart's concurring opinion in *Houchins*, which was essential to the majority, specifically stated that unequal treatment would raise constitutional concerns. *Houchins*, 438 U.S. at 16 ("The Constitution does no more than assure the public *and* the press equal access once government has opened its doors.") (emphasis added).

Section 6254(f)(3) raises precisely this problem. It directly and explicitly favors certain speakers and

competitors in the marketplace (for example, private investigators) while excluding competing services such as those of public record information services. *Cf. 44 Liquormart v. Rhode Island*, 517 U.S. 484, 505-06 (1996) (noting as part of the Court's First Amendment analysis the incidental anti-competitive effects of the prohibition against price advertising). Private investigators and the press receive specific exemptions and unique advantages under the statute. They may include for profit in their statutorily exempt services the very same information that Petitioner attempts to justify as "private" under the statute.

Nor does affirmance require either recognition of a broad right of access to all information within the government's control, or a right governed by "ad hoc standards." Pet. Br. at 24, 26, 30. Unlike in *Houchins*, Respondent does not seek a broad right of access to sources of information within government control. It simply asks to be treated equally with other speakers according to well-established First Amendment doctrines that did not require the court below to engage in the ad hoc decision-making that troubled the *Houchins* plurality. 438 U.S. at 14.

To the extent that California has *required* disclosure of almost all elements of arrest records, and *explicitly authorized* disclosure of address information from these records for a wide range of purposes, it should not be allowed in granting access to discriminate against certain forms of non-commercial and commercial expression on privacy grounds. At issue is a provision that discriminates on its face on the basis of the content of speakers' expression, and whose avowed purpose is to reduce both non-commercial and commercial speech. Furthermore, this case hinges on public records, which have a very different practical and historical status than either internal government documents (much less details of prison management at issue in *Houchins*) or government subsidy decisions.



3. Because California Is Not Subsidizing Speech, this Court's Government Subsidy Precedents Do Not Apply

Petitioner's and its *amici's* attempt to characterize the use restriction as a permissible governmental subsidy decision, sheltered from heightened scrutiny under Rust v. Sullivan, 500 U.S. 173 (1991), is unavailing. Rust, Regan v. Taxation with Representation, 461 U.S. 540 (1983), and their progeny concerned *government funding decisions* or closely related tax subsidy decisions. See, e.g., National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2179 (1998) ("Government may allocate *competitive funding* according to different criteria").

Here California is in no way subsidizing speech, and the record cannot support this characterization. In fact, the record reflects that California and its localities are free to *charge* for copies of their arrest records—and that they often do so, in some cases at prices above cost. Supplemental Excerpts of Record ("SER") 639-53. Moreover, Petitioner and the State of California presented no evidence to support their contention that these disclosures cost the State or its localities any money. *Id. passim*. Finally, arrest records are public records, almost all of which California *requires* be disclosed to *anyone* upon request. Unlike public expenditures, they are not a finite public resource whose benefits government must selectively bestow.

This Court has refused to extend Rust to contexts where government was not funding recipients to speak on its behalf, much less not funding them at all. See Rosenberger v. Rector & Visitors, 515 U.S. 819, 833 (1995) (distinguishing Rust because government was not "disburs[ing] public funds to private entities to convey a governmental message"); *id.* at 892 n.11 (Souter, J., dissenting). It certainly should not accept the Solicitor General's suggestion that the doctrine be expanded to authorize the government to discriminate in withholding

public record information that it dispenses at or above cost, favoring certain speakers over others based upon the non-commercial or commercial content of their speech. Thus, the Court may rule for Respondent without disturbing either Houchins on the one hand or Rust on the other.

**II. SECTION 6254(f)(3) IS UNCONSTITUTIONAL REGARDLESS OF WHETHER IT IS A RESTRICTION ON COMMERCIAL OR NON-COMMERCIAL SPEECH.**

The statute fails to pass muster under ordinary analysis of content-based restrictions on expression and commercial speech analysis because it does not directly and materially advance its stated interest in protecting privacy and is broader than necessary for achieving its goal.

As *amici curiae* The Newsletter Publishers Association and The Washington Legal Foundation demonstrate, the statute is a content-based restriction on expression, allowing dissemination of arrestee addresses for favored uses that do not propose a commercial transaction, but not for others. Indeed, this sort of statutory regime operates in precisely this way with regard to public record information services. It discriminates against their communication of the information to the public based upon the content of their communication. See, e.g., Carey v. Brown, 447 U.S. 455, 465 (1980) (invalidating a statute that allowed labor picketing but prohibited other picketing in residential areas); First National Bank v. Bellotti, 435 U.S. at 777 ("The inherent worth of the speech . . . does not depend upon the identity of its source").

Even if this Court were to conclude that section 6254(f)(3) is a commercial speech restriction, the statute would still clearly fail the Central Hudson test. See 447 U.S. at 566. A core concern of the Central Hudson analysis is that government not restrict commercial speech in a highly selective fashion that distorts the marketplace. See Greater New Orleans, 119 S. Ct. at 1933; Rubin v. Coors Brewing Co., 514 U.S. 476, 481 (1995); Virginia State Bd. of



Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976). Section 6254(f)(3) suffers from precisely this defect. To avoid misidentifying arrestees with common names, conscientious end users will be required to use the services of a class of favored disseminators of the information, including journalistic reports, private investigators, and political opposition and campaign contributor research specialists. The statute prevents potential customers from using the services of disfavored potential disseminators such as United Reporting and public record information services.

As with the statutes struck down in Greater New Orleans and Rubin, section 6254(f)(3) is so riddled with exemptions and inconsistencies that it does not sufficiently advance the government's stated purpose of protecting privacy.<sup>13</sup> At the same time, the statute is considerably broader than necessary to serve that interest, as demonstrated by similar, more narrowly tailored California statutes.

First, the statute directs that all information about the arrestee other than his or her address *must* be disclosed. § 6254(f)(1). Thus, any casual observer can obtain the individual's name—which is more sensitive than an address. Second, it authorizes state, local, and federal officials to obtain an arrestee's address without regard to whether they then publicly disclose it. See § 6254(f)(3). Third, the statute creates an exemption under which the media may freely obtain an arrestee's address, and either place it on the front

<sup>13</sup> Petitioner and its *amici* now suggest that section 6254(f)(3) is a measure to protect arrestees from discrimination, or to protect the privacy of crime victims. These issues are not properly before the Court, as Petitioner waived them below and has not met the government's burden of proof with regard to either issue. In any event, the statute is equally infirm with regard to both these interests. It is no less underinclusive, and, in the case of crime victim addresses, more obviously overbroad, as section 6254(f)(2) offers a clear example of a more narrowly tailored approach to withholding information concerning crime victims.

page of any newspaper or tabloid magazine or simply republish it along with a long list of other arrest records. See United Reporting, 146 F.3d at 1140. Fourth, it carves out yet another exception for researchers and political operatives to obtain and place this information in books and databases as long as they do not do so to sell a product or service. See id. Fifth, it allows licensed private investigators to obtain and use the information for *any* investigation. See supra note 8.

In fact, as the California First Amendment Coalition warned the legislature during consideration of Senate Bill 1059, by withholding the addresses but revealing the names of arrestees, far from protecting the privacy of arrestees, the statute instead substantially increases the risk that innocent individuals will be misidentified as having been arrested for crimes. SER 382.

**A. California's Policy Is So "Decidedly Equivocal" that It Fails to Establish that Privacy Is in Fact a Substantial Interest in this Context**

The net result is a statutory regime riddled with inconsistencies. Although in other cases before this Court the government has been able to establish a legitimate and substantial interest in protecting the privacy of its residents, California's "unwillingness to adopt a single . . . policy that consistently endorses [that] interest" undermines its characterization of its interest in this context as being "substantial." See Greater New Orleans, 119 S. Ct. at 1932; see also id. at 1930 (concluding that it "is by no means self-evident" that government has a substantial interest due to conflicts in government policy). Consequently, the state's "decidedly equivocal" policy toward protecting arrestee information causes the statute to fail the second prong of the Central Hudson test. Id. at 1931-32.

For the same reasons, the *amici* Attorneys General are mistaken in their attempt to rely upon this Court's Freedom of Information Act ("FOIA") jurisprudence as supporting the irrationally discriminatory regime embodied in section

6254(f)(3). See Br. of States of New York et al. at 10-14. Under FOIA, when privacy interests outweigh the interest in disclosure, the result is the rational one of withholding the information from *all* private parties. Petitioner and the *amici* Attorneys General would twist this jurisprudence to give the government sweeping power merely to invoke privacy in order to withhold government information *selectively* from some private parties, but not from others whose use of the information is no less compatible with privacy.

Moreover, under FOIA, the reasons for the request, see United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 771 (1989), and the uses that can be made of the information in serving a public or private interest are irrelevant. See Department of State v. Ray, 502 U.S. 164, 179-81 (1991) (Scalia, J., concurring). By contrast, under section 6254(f)(3), the purpose for requesting the information and its eventual use for solicitation of any product or service (not concerns about arrestee privacy) are decisive.

Furthermore, FOIA is far from the only source of federal policy relevant to the California law. As noted above at n.10, the Paperwork Reduction Act of 1995 further undermines the argument that federal law or policy supports California's irrational approach to privacy protection.

**B. The Statute Is So Riddled with Exceptions that it Does Not "Materially and Directly" Advance the Stated Interest**

The government bears the burden under the third prong of Central Hudson of demonstrating that a speech restriction "directly advances the governmental interest asserted," see, e.g., Greater New Orleans, 119 S. Ct. at 1932; Edenfield v. Fane, 507 U.S. 761, 770 (1993), and must show that a "ban will *significantly*" advance the government's interest, 44 Liquormart, 517 U.S. at 505 (plurality opinion) (emphasis added), and "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

Edenfield, 507 U.S. at 770-71. In this case, as in Greater New Orleans and Rubin, the government's stated interest in protecting privacy is undermined directly and fatally by the significant exceptions in the statute so that section 6254(f)(3) cannot "directly and materially advance" this goal.

Like the discriminatory advertising ban of 18 U.S.C. § 1304 invalidated in Greater New Orleans, section 6254(f)(3) clearly reveals the state's "simultaneous encouragement" of disclosures of arrestee addresses to the public that are incompatible with the asserted statutory goal. 119 S. Ct. at 1933. "[T]he Government presents no convincing reason for pegging its speech ban" to the statutory categories, in light of its purported goal. Id. at 1934. Indeed, disclosures to licensed private investigators, the media, political operatives and government officials intrude on an arrestee's privacy as much as or more than disclosure to others, such as public record information services. (They are also as or more likely to produce "discrimination" against arrestees.) Furthermore, private investigators and newspapers that republish arrestee address information deliver the same information that Respondent and public record information services would deliver, with newspapers delivering it to a much larger audience. As Greater New Orleans underscores, government "decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment." Id. at 1935.

Moreover, the effect of the challenged restriction on speech must be "evaluated in the context of the entire regulatory scheme." Id. at 1934 (citing Rubin, 514 U.S. at 488). Here, "the general thrust of [California's] policy . . . favor[s] greater disclosure of information, rather than less." Rubin, 514 U.S. at 484. Indeed, the statute actually *requires* disclosure of all other elements in arrestee records, including information such as name and alleged crime that is more sensitive than the arrestee's address. Cf. id. (noting that the



statute at issue required disclosure of alcohol content on wine and spirit labels).

California uses non-discriminatory and far more effective means of protecting privacy for other public records. For example, the state provides that victims of spousal abuse may obtain fictitious addresses from the Secretary of State, who serves as their agent for purposes of service of process. CAL. GOV'T CODE §§ 6205-11 (Deering 1999). It requires state and local agencies to use the substitute address on any records made available for public inspection, and prohibits disclosing the person's real address absent a court order or request by law enforcement. *Id.* at §§ 6206, 6208. Similarly, section 1808 of the California Vehicle Code requires redaction of home addresses from motor vehicle records for legislators and state and county employees involved in the criminal justice system upon their request. CAL. VEH. CODE §§ 1808.4, 1808.6 (Deering 1999).

Both provisions directly and materially advance the stated government interest in privacy by prohibiting disclosure of home address information to the public *without exception*. These other approaches take to heart the Court's observation in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), that instead of criminalizing speech, government can "classify [sensitive] information [and] establish and enforce procedures ensuring its redacted release." *Id.* at 534. They contrast strikingly with the "Swiss-cheese" approach to disclosing addresses in section 6254(f)(3) and demonstrate that the state could have protected the privacy of arrestees, but instead chose a very different course.

Likewise, the states that filed an *amicus curiae* brief in support of Petitioner also use a variety of non-discriminatory, more targeted, and far more effective means

of protecting privacy interests in public records than the flawed approach at issue here.<sup>14</sup>

These other statutes confirm the Ninth Circuit's conclusion regarding the overall irrationality of the statutory scheme at issue in this case. The "numerous exceptions" in section 6254(f)(3) risk producing "a far greater affront to privacy" than the uses that it prohibits. *United Reporting*, 146 F.3d at 1140. Because "other provisions of the same act directly undermine and counteract its effects," section 6254(f)(3) fails to "directly and materially advance its aim." *Rubin*, 514 U.S. at 489.

**C. The Restriction Is "More Extensive than Necessary" in Light of Readily Apparent, More Narrowly Tailored Alternatives.**

Section 6254(f)(3) also is "more extensive than necessary" to advance its stated goal. *Central Hudson*, 447 U.S. at 566. For example, the same statute allows either the victim or the victim's parent or guardian to prevent all disclosure of the name of a crime victim. § 6254(f)(2). Similarly, the California spousal protection and Vehicle Code provisions discussed *supra* p.26 clearly demonstrate that section 6254(f)(3) is not narrowly tailored. Both provisions provide for confidential treatment of address information of only narrow categories of individuals with a particular need for privacy protection. Even for these victims of abuse and public employees, release of address

<sup>14</sup> For example, Hawaii, Nevada, and Washington have enacted fictitious address programs similar to that of California for victims of domestic violence, see HAW. REV. STAT. ANN. § 576B-312 (Michie 1999), NEV. REV. STAT. § 217.464 (1997), WASH. REV. CODE § 40.24.010 *et seq.* (1999), while Colorado, Delaware, and South Carolina in their victims' bill-of-rights statutes have enacted measures to ensure that government officials do not publicly disclose at least the addresses and telephone numbers of victims, see COLO. REV. STAT. ANN. § 24-4.1-303(2) (West 1999), DEL. CODE ANN. tit. 11, § 9403 (1998), S.C. CODE ANN. § 16-3-1525(C) (Law. Co-op. 1998).



information is suppressed only upon their request. CAL. VEH. CODE §§ 1808.4, 1808.6. These approaches avoid the statute's paternalistic assumption that no individuals in public records want to be found or contacted by others, while protecting the First Amendment rights of those individuals to receive information. See, e.g., *Greater New Orleans*, 119 S. Ct. at 1935-36 (speaker and the audience, not Government, should be left to assess the value of accurate, non-misleading information about lawful conduct).

The varied statutory exemptions and inconsistencies, coupled with the availability of other regulatory options that could have advanced the asserted privacy interest in a manner less intrusive of First Amendment rights, leave no basis for upholding the statute under this Court's doctrines governing content-based regulation of expression generally or commercial speech specifically.

### III. DATABASES OF PUBLIC RECORD INFORMATION PROVIDE IMPORTANT PUBLIC BENEFITS THAT THIS COURT SHOULD BE CAREFUL NOT TO SACRIFICE.

Petitioner and its *amici* all urge this Court to accept theories that would give the government broad authority to adopt a discriminatory, essentially irrational approach to disclosing public records. They cite the possibility of databases of arrestee information as justification for that regime.

The IRSG and SIIA include the leading public record information services, whose customers overwhelmingly consist of government and business professionals, as well as journalists. Almost none of their members disseminate any arrest record information. However, the position urged by Petitioner and its *amici* would have far broader implications and remove First Amendment protection for virtually all public record information services. This Court should reject it.

As the court held in *Legi-Tech*, electronic database providers, like IRSG and SIIA members LEXIS-NEXIS and West Group, are organs of the press entitled to full First Amendment protection. 766 F.2d at 732. Indeed, in an era in which electronic information is becoming an increasingly important source of news and information for citizens, *id.*; see also *Reno v. ACLU*, 521 U.S. 844 (1997), curbing the information available from information services significantly reduces the free flow of ideas and information.

Moreover, commercial dissemination of public records serves a wide array of important functions. These services increase both the transparency of government operations to private citizens, and increase governmental efficiency by providing a reliable source for inter-agency record retrieval. Indeed, federal, state and local governments are a significant part of IRSG and SIIA members' customer base.

These services also allow professionals to obtain information without the cost and inconvenience of retrieving and copying a record from an agency or hiring a private investigator to retrieve the information in county offices. Furthermore, these services are as accurate and, in some instances, more accurate and complete than the original source.

The services are used for a wide range of beneficial purposes, including important government objectives such as locating criminals, fugitives and witnesses to crimes, child support enforcement, finding biological parents, consumer protection, and environmental enforcement. For example, current records are helpful for verifying an individual's identity, locating a non-custodial spouse, finding a spouse's hidden assets, and confirming whether professionals, such as doctors, lawyers and private investigators who are the subject of consumer complaints, in fact have valid licenses. Furthermore, federal and state environmental agencies use land record databases to trace ownership of land in order to

identify polluters and to warn individuals who live or formerly lived in hazardous waste areas.

The services also assist important private sector activities, including press investigations into the workings of government and campaign donations. They have become an increasingly important tool for fraud prevention efforts by businesses extending consumer credit or performing due diligence before engaging in business ventures in the increasingly mobile world economy. The services also are widely used in the legal profession for purposes as diverse as locating witnesses, finding readily admissible evidence, and locating heirs to estates. Moreover, non-profit health services use public record services to locate blood, bone marrow, and organ donors.

For all these reasons, in this case, which has important implications for all types of public records, the Court has further reason to avoid broad rules eliminating constitutional protection for expression using public records. Cf. Denver Area Educ. Telecomm. Consortium Inc. v. FCC, 518 U.S. 727, 741-43 (1996) (declining to adopt a broad new First Amendment rule when confronting a new technology).

### CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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(10)

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**IN THE SUPREME COURT OF THE UNITED STATES**

Los Angeles Police Department,  
*Petitioner,*

v.

United Reporting Publishing Corp.,  
*Respondent.*

**On Writ of Certiorari  
to the United States Court of Appeals  
For the Ninth Circuit**

**BRIEF OF AMICUS CURIAE  
INVESTIGATIVE REPORTERS AND EDITORS, INC.  
IN SUPPORT OF RESPONDENT**

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**QUESTION PRESENTED**

Whether the First Amendment prohibits the Los Angeles Police Department from concealing the identity of arrestees by withholding their residence addresses from the public under circumstances in which (1) national experience, including common practice in America when the Constitution was adopted, provides for a tradition of public accessibility to event-based information about arrests; (2) public knowledge about the identity of people arrested (including residence address information to avoid confusion with individuals having the same or similar name) plays a significant positive role in the proper functioning of the criminal justice system.

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## INTEREST OF AMICUS CURIAE

*Quis custodes et custodiet?* Almost a thousand years ago, the Romans pondered the dilemma inherent in delegating law enforcement authority to their government by posing a simple question: *who guards the guards?* Juvenal, SATIRES VI, act I, l. 347 (Niall Rudd Trans, Clarendon Press 1991). Today, a similar paradox is presented by the dual role of the government as both a logical source of protection from violations of personal privacy and an information collector with monopoly power over criminal justice data.

In this case, the Los Angeles Police Department (“LAPD”) asserts that California has complete discretion to regulate dissemination of any “private information” it gathers in connection with administration of the state criminal justice system. The statute at issue purports to protect the privacy interest of arrestees. It does so by limiting dissemination of residence address information collected by the police as part of their traditional booking procedure. Although the narrow question presented by LAPD appears to concern only restrictions on commercial speech, arguments in support of reversing the decision below require petitioner and its *amici* to assert that access to information necessary to establish with reasonable certainty the identity of arrestees could be denied to *any* person outside the government. This claim, however, contradicts a tradition of public access to core information about arrests that dates back to the founding of the Republic. It also contravenes competing interests, such as citizen participation in fair and effective law enforcement and a citizenry fully informed about the operations of their government. See William H. Rehnquist, *Is an Expanded Right to Privacy Consistent With Fair and Effective Law Enforcement?*, 23 Kan. L. Rev. 1, 2, 8 (1974) (“Effective Law Enforcement”).

*Amicus Curiae* Investigative Reporters and Editors, Inc. is a not-for-profit organization dedicated to improving the quality of investigative reporting within the field of journalism.<sup>1</sup> Its more than

<sup>1</sup> Written consent of both parties to the filing of this brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37. No party wrote any part of this brief or contributed to its financial support.

4,000 members work for the nation's leading broadcasters, cable operators, newspapers, magazines, and new media companies, and are directly engaged in the day-to-day practice of acquiring and disseminating news to the public. Together with the Missouri School of Journalism, IRE also operates the National Institute for Computer-Assisted Reporting, which trains reporters in the practical skills of analyzing electronic information and provides databases for use by professional journalists. IRE's interest in this case is based upon sweeping assertions of informational privacy by LAPD and its *amici*. If successful, LAPD's assertions of these novel privacy claims could effectively cut off at the source access to information about arrests that have been available to Americans since at least the mid-1700s.<sup>2</sup> Consistent with the Constitutional mission of its members to supply information about the operations of government to the public,<sup>3</sup> IRE has gathered for the Court materials not otherwise provided by the

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<sup>2</sup> Logic suggests that the government is typically the sole source of residence address information for an individual still in custody. For this reason, LAPD's assertion that Section 6254(f)(3) "would only 'cut off the information at its source' if it prohibited arrestees from disclosing their own addresses" misses the mark. See Brief of Los Angeles Police Dept ("LAPD Br.") at 34-25 n.14. To whom could an arrestee impart such information when she is in a holding cell, other than her fellow inmates? Moreover, LAPD's refusal to disseminate an arrestee's residence address to the general public has the practical effect of preventing accurate identification of arrestees because so many individuals have the same or similar names. See, e.g., <<http://search.bigfoot.com/SEARCH>> (visited May 23, 1999) (more than 250 listings in State of California alone for common name such as "John Hall").

<sup>3</sup> See, e.g., *Wilson v. Layne*, 119 S. Ct. 1692, 1698 (U.S. 1999), in which the Court noted that

'In a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.' No one could gainsay the truth of these observations.

parties regarding relevant historical practices at the time of the adoption of the Constitution. In doing so, IRE seeks to assist the Court in its evaluation of "what sort of limits shall be placed on the government in its effort to enforce laws enacted by the legislature." *Fair and Effective Law Enforcement*, 23 Kan. L. Rev. at 19.<sup>4</sup>

## SUMMARY OF ARGUMENT

LAPD and its *amici* assert, without basis, that there is no Constitutional impediment to concealing from the general public current facts about the identity of arrestees. Without access to this information, the general public cannot ascertain with reasonable certainty *who* is arrested and *why*? LAPD claims, however, that a privacy interest in the residential address information it collects from arrestees allows California complete discretion to deny anyone outside government access to those facts. The historical record, however, demonstrates that a tradition of public access to information about the identity of arrestees extends back to the founding of the Republic. Moreover, competing interests, including the public's right to be informed about core operations of the criminal justice system, together with promotion of citizen participation in fair and effective law enforcement, demonstrates a significant positive role played by continued access by the public to event-based facts about the identity of arrestees.

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<sup>4</sup> LAPD acknowledges in a footnote that regulating press publication of arrestee addresses *en masse* "would require the state to interfere directly with the editorial discretion of newspapers, a cure that the state may deem to be worse than the disease." LAPD Br. at 36 n.21. Elsewhere in its brief, however, LAPD states that "[h]ad the California legislature so desired, it could have eliminated all public access to the addresses of arrestees and victims." *Id.* at 16. LAPD also appears to suggest that California retains the discretion to "thwart" access by the press and thereby "undermine a central First Amendment value." *Id.* at 40.



## ARGUMENT

### I. A FIRST AMENDMENT RIGHT OF PUBLIC ACCESS APPLIES TO CURRENT FACTS ABOUT THE IDENTITY OF ARRESTEES BECAUSE NATIONAL EXPERIENCE, INCLUDING COMMON PRACTICE IN AMERICA WHEN THE CONSTITUTION WAS ADOPTED, HAS ESTABLISHED THIS TRADITION

LAPD and its *amici* acknowledge that a qualified First Amendment right of access – based on the crucial role traditionally played by public access in the functioning of the criminal justice system – applies to criminal proceedings. See Brief of the States of New York *et al.* As *Amici Curiae* in Support of Petitioner (“State Prosecutors Br.”) at 7 n.1 Brief of United States as *Amicus Curiae* Supporting Petitioner (“US Br.”) 16 n.1. (“a qualified constitutional right of access to judicial proceedings that have traditionally been held in public, with a concomitant or alternative right of access to records of those proceedings.”); Brief for Petitioner (“LAPD Br.”) at 18 and 18 n.8 & 9.<sup>5</sup> Referring solely to case law, but failing to cite any historical evidence, LAPD and its *amici* maintain that the Constitution does not create a right of access under the circumstances presented here.<sup>6</sup> LAPD Br. At 16; State Prosecutors Br. at 7 n.1 (qualified First Amendment right of access to criminal proceedings “has never

<sup>5</sup> Decisions of this Court between 1980 to 1986 have recognized a qualified First Amendment right of access to preliminary hearings, jury selection, criminal trial during testimony of a minor victim, and, as a general matter to criminal trials (plurality opinion). See State Prosecutors Br. at 7 n.1 (listing cases).

<sup>6</sup> At least one state supreme court has recognized that “the public and the media have a constitutional right of access to information relating to the activities of law enforcement officers and to information concerning crime in the community. *Caledonia Record Publishing Co. v. Walton*, 154 Vt. 15, 22, 573 A.2d 296, 299 (1990) (in order to determine reach of this constitutional right, it is necessary to balance competing interests).

been held to extend to the contents of a police blotter”).<sup>7</sup> Having

<sup>7</sup> Notably, *amicus curiae* the United States of America appears to differ with LAPD on this crucial point. Perhaps anticipating (but not itself marshaling) the relevant historical information, the United States acknowledges that “a governmental decision not to provide any information about some or all arrests might raise [First Amendment] concerns, particularly if (as seems likely) there proved to be some historical tradition of making public at least some information about the exercise of that core government power [of arrest].” *Id.* (emphasis added). The United States asserts, however, that this case raises no constitutional issues because “California continues to provide full public access to detailed information on every arrest and crime report -- all information, indeed, except the “current address” of the . . . person arrested.” *Id.* at n.15. This concession, however, is a legal equivalent to the medical assurance that “the operation was a success, but the patient died.” Elsewhere, the Department of Justice has implicitly acknowledged that an arrestee’s name alone, without some other additional information, is insufficient to provide positive identification. See *Use and Management of Criminal History Record Information: A Comprehensive Report* (Glossary at 4) (US. Dept. Of Justice, Office of Justice Programs, Bureau of Justice Statistics 1993) (“DOJ Criminal History Record Report”) (available at <<http://www.search.org>>) (“Because individuals can have identical or similar names, ages, etc., **identifications based on such characteristics are not reliable**”) (emphasis added); see also *id.* at 17 (“name searches are not fully reliable”); Robert R. Belair, *Criminal Justice Information Privacy* 54 (Keynote Presentation, Symposium on Integrated Justice Information Systems/The National Consortium for Justice Information and Statistics) <<http://www.search.org/1999>> (visited May 21, 1999) (“[m]ismatched information . . . is a major privacy threat and is associated with name-only checks. . . . The use of aliases and the failure of name-only checks to retrieve available criminal histories increases the possibility of false-negative findings during background checks and can create a public safety threat”). (Accordingly, failure to provide residence address information deprives the public of information reasonably required to avoid misidentification of persons arrested with individuals having the same or similar names. Disclosure of a residence addresses provides the least intrusive unique coordinate that prevents misidentification while, at the same time, satisfying the historical tradition of access. See DOJ Criminal History Record Report at Glossary 4 (discussing use of biometric characteristics such as fingerprints, retinal images, and voice prints for identification).

failed to evaluate the relevant history, none of the three briefs filed in support of Petitioner considered these key facts in light of well-established precedent with respect to finding a qualified First Amendment right of access.”<sup>8</sup>

In past cases, this Court has established the existence of a First Amendment-based right of public access by conducting a two-part inquiry. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (“*Press-Enterprise II*”); *El Vocero De Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150 (1993) (*Press-Enterprise* test controls question of First Amendment right to public access). The first prong requires a historical inquiry (here, whether contemporaneous information about the actual identity of persons arrested has traditionally been available to the general public at the time our Constitution was adopted). *Press-Enterprise II*, 478 U.S. at 8. The second prong involves a functional inquiry (whether public

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<sup>8</sup> This is a serious defect in LAPD’s argument because its assertion of complete discretion to close off access to current facts about the identity of arrestees hinges upon the absence of a presumptive First Amendment right of access. LAPD and its *amici* assert this position in connection with their effort to sustain the constitutionality of a statute that conditions access to arrestee addresses upon agreement not to use that information for “commercial purposes.” See Cal. Gov’t Code § 6254 (Deering 1997). The purported basis for curtailing such access is to ensure the privacy of persons who have been arrested by protecting them from commercial solicitations. LAPD Br. at 30-32. LAPD avoids claiming that this information should be withheld because arrestees have a recognized constitutional right of privacy in the mere fact of an arrest. See *Paul v. Davis*, 424 U.S. 693, 712-714 (1976) (no constitutional privacy right affected by publication of name of arrested but untried shoplifter). Rather, LAPD argues that the “booking” data it gathers is merely a government record containing “personal” information. LAPD Br. at 25 & n.15. As such, it is up to “political institutions” to weigh any privacy interest that may be at stake with other, competing values. LAPD Br. at 25, 34. The monopoly interest asserted by LAPD, however, does not comport with any legitimate state interest. Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 75 N.Y.U. L. Rev. 354, 368-71 (1999).

access plays a significant positive role in the functioning of the particular process-- in this case, the overall administration of the criminal justice system). If the particular proceeding in question passes these tests of “experience and logic,” a qualified First Amendment right of public access attaches:

[T]he presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.

478 U.S. at 8-10. (citations omitted).

As a threshold matter, then, this brief reviews evidence that information about the identity of arrestees has “historically been open to the press and general public.” *Id.* at 8. The analysis focuses upon practices antedating and attending the adoption of the First Amendment:

[A] common-law tradition of openness at the time the First Amendment was ratified suggested an intention and expectation on the part of the Framers and ratifiers that those proceedings would remain presumptively open . . . history matter[s] primarily for what it reveal[s] about the intentions of the Framers and ratifiers of the First Amendment.

See *Press-Enterprise II*, 478 U.S. at 21 (Stevens J. and Rehnquist J. dissenting) See also Leonard W. Levy, *ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION* 213 (1988) (“ORIGINAL INTENT”).<sup>9</sup>

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<sup>9</sup> For example, Professor Levy, relying upon “historical evidence . . . at the time when our organic laws were adopted,” see *Press-Enterprise II*, 478 U.S. at 21, observes that

When the Framers of the First Amendment provided that Congress shall not abridge the freedom of the press, they could only have meant to protect the press with which they were familiar and as it operated at the time. In effect, **they constitutionally guaranteed the freedom of the press as it existed** and was practiced at that time.

ORIGINAL INTENT at 213 (citations omitted) (emphasis added). See also Leonard W. Levy, *EMERGENCE OF A FREE PRESS* 206 (1985). Cf. *Payton v. New York*, 445 U.S. 573, 592-93 (1980) (examination of common-law understanding



See also LAPD Br. At 19 (a qualified right of public access pursuant to the First Amendment can arise from "unbroken, uncontradicted history" of such rights of public access and from "common practice America when the Constitution was adopted") (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 565, 583 (1980); *Press-Enterprise Co. v. Superior Ct. of Cal.*, 464 U.S. 501, 508 (1984) ("Press-Enterprise I")).

**A. Public Accounts of Criminal Conduct from the Colonial Period through the Ratification Era**

Newspapers containing the names and descriptions of persons associated with criminal conduct were widely available in colonial America. See *infra* at 11-16. The source of that information, however, did not depend upon an exercise of judicial or other government discretion as conjectured by LAPD. See LAPD Br. at 19.<sup>10</sup> Indeed today's vast network of federal, state, and local law enforcement officers would be utterly foreign to our colonial forebears":

Law enforcement in colonial times was . . . 'a business of amateurs.' Public order was maintained by a loose system of sheriffs, constables, and night watchmen. Most counties had a sheriff, appointed by the governor of the colony as the chief law enforcement officer, in charge not only of jails and

of officer's authority to arrest sheds light on what Framers of Fourth Amendment might have thought to be reasonable).

<sup>10</sup> This variety of specious reasoning has been called the "fallacy of factual verification," or, more specifically, "the fallacy of the hypostatized proof." See David Hackett Fischer, *HISTORIANS' FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* 55-56 (Harper & Row 1970). According to Fischer, "this form of error commonly occurs when a historian reifies a historiographical interpretation and substitutes it for the actual historical event it allegedly represents and then rejects contradictory interpretations or affirms compatible ones." *Id.* at 56.

prisoners, but of jury selection as well. But sheriffs had no professional law enforcement staffs under their direction. Instead, ordinary citizens who were employed in other trades or professions as their means of livelihood took turns serving as constables during the day or watchmen during the night.

Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 835 (1994)<sup>11</sup>. See Lawrence M. Friedman, A

<sup>11</sup> Professor Steiker further observed that

The constabulary 'carried the main burden of law enforcement,' as its members were required to patrol during the day as well as supervise the night watch . . . . The constables generally served without training, uniforms, weapons, or other accoutrements of modern law enforcement officers. They ordinarily did not receive stipends, but were sometimes compensated by private individuals for the return of stolen property. The night watch was equally amateurish; early attempts to have a paid watch in New York and Boston ultimately failed because it was so expensive; thus the watch was generally staffed by requiring all citizens to take a turn "in the duty of watch and ward." . . . The constabulary and the watch differed from modern law enforcement structures not only in personnel, but in function; their duties often strayed quite far from our modern notions of peacekeeping and investigation . . . . On occasions when greater manpower was needed to accomplish the goals of law enforcement, the colonial recourse was once again to amateurs. . . . Constables or watchmen could issue the "hue and cry" in town squares and public marketplaces, calling out ordinary citizens to help chase after suspected criminals. Magistrates or sheriffs could call upon the posse comitatus--literally, "the power of the county" -- for assistance . . . . In both cases, however, the help that was summoned was not the professional arm of government that we now associate with law enforcement; rather, it was the force of lay people brought to bear on suspected wrongdoers in their own communities.

107 Harv. L. Rev. 830-33 (citations omitted).



HISTORY OF AMERICAN LAW 252-53 (1973) (even the largest cities did not have police forces until well into the 19<sup>th</sup> century; in rural areas, there was no professional enforcement at all); Edward H. Savage, A CHRONOLOGICAL HISTORY OF THE BOSTON WATCH AND POLICE (FROM 1631 TO 1865) 11 (Boston, 1865); Douglas Greenberg, CRIME AND LAW ENFORCEMENT IN THE COLONY OF NEW YORK (1691-1776) 156-57 (1974); David A. Sklansky, *The Private Police*, 46 UCLA L. Rev. 1165, 1195-1212 (1999).

Thus, notwithstanding the absence of organized police departments in the early years of the Republic, chronological event-based information about criminal conduct – the equivalent of today's police blotter – was apparently available from local authorities and directly from the citizens themselves in their overlapping roles as lay enforcers of the law.<sup>12</sup> "Local and intercolonial news" appearing in

<sup>12</sup> According to the Department of Justice's own account, *supra* at Note 7,

At the beginning of [the twentieth century] there was hardly such a thing as a criminal history record, much less a criminal history record system. Indeed, prior to 1835 not a single American city enjoyed even an organized police force, much less an organized police record system . . . . Rather, throughout the 19<sup>th</sup> century, most urban American police departments, if they kept records at all, kept what can be called the precursor of the criminal history record – the so-called "police blotter." The blotter was, and is, a purely chronological listing of events occurring each day in a particular police department or, more often, a particular precinct or subdivision of a police department. Customarily, the blotter contains the name, age, sex and race of persons arrested, along with citations to alleged offenses

DOJ *Criminal History Record Report* at 20. The Department of Justice further notes that

[t]he booking process is a critical stage in the information flow in a criminal case. Booking typically involves an entry into a chronological arrest log or arrest register . . . .

The booking process . . . includes the taking and recording of personal information about the arrestee, such as name, address, date of birth, sex, race, eye and hair

papers such as THE NEW ENGLAND COURANT, the BOSTON EVENING-POST, THE BOSTON GAZETTE, and THE PENNSYLVANIA GAZETTE was furnished by "[p]iracy and privateering . . . fires, counterfeiting, murders, robberies, and suicides." Frank Luther Mott, AMERICAN JOURNALISM: A HISTORY OF NEWSPAPERS IN THE UNITED STATES THROUGH 250 YEARS (1690 TO 1940) 52 (The Macmillan Co. 1941) ("AMERICAN JOURNALISM").<sup>13</sup> Such information served a variety of purposes, from maintaining social order through public ostracism, *see, e.g.*, Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 Mich. L. Rev. 1912-15 (1991), to assisting with the apprehension of culprits and the recovery of stolen property. *See* Harry B. Weiss and Grace M. Weiss, AN INTRODUCTION TO CRIME AND PUNISHMENT IN COLONIAL NEW JERSEY 25 (1960).<sup>14</sup>

For example, anxious to alert fellow citizens to their plight, reward notices were routinely inserted in newspapers by persons suffering losses by theft between 1738 and 1779:

The rewards offered for stolen property varied according to the value of the property and ranged

color, weight and any scars, marks or tattoos that may be useful in identifying the person.

*Id.* at 10.

<sup>13</sup> A growing number of newspapers during this period kept their readers informed about less than exemplary conduct of their fellow Colonists. "By 1735 there were five newspapers in Boston, a town which still had less than 20,000 population . . . 37 newspapers were in the course of publication in the colonies on April 17, 1775 when the first military activities of the Revolution began." AMERICAN JOURNALISM at 22, 101. *See* generally Sidney Kobre, THE DEVELOPMENT OF THE COLONIAL NEWSPAPER 44-94 (Peter Smith 1960).

<sup>14</sup> It is worth noting that in both instances, dissemination of information to the general public about the identity of arrestees to the general public contributed to more effective enforcement of existing laws. The same is true for current dissemination of the same type of information, although in different ways. *See infra* at II.

from 30 to 200 shillings. Frequently rewards were offered separately, one for the capture of the thief and one for the return of the property . . . In spite of rewards, it is believed that only a small percentage of the thieves were captured and the goods recovered. According to the reward notices, many of the thefts occurred by persons who were known and described, probably servants **In nearly all cases, the published descriptions of the criminals were complete enough to result in their capture** had there been sufficient methods of communication and cooperation between police officials.

*Id.* at 24-25 (emphasis added).

In sum, the following selected excerpts from newspapers published between 1751 and 1791 reveal that, contrary to the assertions of petitioner, *see* LAPD Br. at 21 ("experience suggests that newspapers do not generally print addresses"), it was common practice in America both prior to and after adoption of the Constitution to identify arrestees publicly and with great specificity.<sup>15</sup>

● **THE PENNSYLVANIA GAZETTE, December 24, 1751** (name, personal relative, and charge): *Last Week Esther M'Connell (the Mother of Mary M'Connell, mention'd lately in this Paper) was committed to the Jail of this City, for the harbouring of John Webster, and receiving Goods from him, knowing them to be stolen: And Webster's Wife was sent to the Work-House.*

● **THE PENNSYLVANIA GAZETTE January 29, 1752** (name, personal relative, location of relative, charge, diction, physical description, clothing): *Philadelphia, January 29, 1752. LAST night broke out of the goal of the county of Gloucester,*

<sup>15</sup> Identifying characteristics of arrestees and criminal suspects mentioned in the newspaper articles, including residence information, are listed parenthetically after the date of publication. Residence information is bolded for emphasis.

*son of John Gosling, of Greenwich, in the county aforesaid, by trade a blacksmith, has been used to tend a saw-mill, and can do most sorts of plantation work, of a middle stature, and a tawny complexion: Had on, and took with him, a new beaver hat, and an old one, linnen cap, dark coloured camblet coat and waistcoat, an old brown cloth coat, and an old bluish colour'd cloth waistcoat, check shirt, leather breeches, old light colour'd worsted stockings, new shoes with a pair of square metal buckles. The other named Morgan Rorke, an Irishman, of short statute, speakes tolerable good English, served his time to plantation-business in East-Jersey: Had on a half worn beaver hat, linnen cap, lightish colour'd home-spun coat, about half worn, a homespun greenish colour'd Jacket, check shirt, old leather breeches, grey yard stockings, double-soal'd shoes, with steel buckles. Whosoever takes up and secretes said Prisoners, in any goal, so that they may be had again, shall have Three Pounds reward for each, and reasonable charges paid by John Mickle, Sheriff.*

● **THE PENNSYLVANIA GAZETTE, February 11, 25, 1752** (name, charge, occupation, place of residence, punishment):

*PHILADELPHIA, February 11. Saturday last one William Kerr was committed to the Jail of this City, on Suspicion of having counterfeited the Mill'd Pieces of Eight. There were several bad Ones found upon him, and a Receipt for the mixing of Metals. He pretends to be a Weaver, and says he lives at Bethlehem, in the Jerseys, with one William M'Crackken . . .*

*PHILADELPHIA, February 25. Last Week William Kerr (lately mention'd in this Paper) was indicted and convicted at the Mayor's Court, of uttering Counterfeit Mill'd Pieces of Eight, knowing them to be such, for which he receiv'd Sentence as follows: To stand in the Pillory one Hour To-morrow, to have his Ear nail'd to the same, and the Part nail'd cut off: And on Saturday next to stand another Hour in the Pillory, and to be whipt Thirty-nine*



*Lashes, at the Cart's Tail, round two Squares; and then to pay a Fine of Fifty Pounds.*

● **CONNECTICUT COURANT AND WEEKLY INTELLIGENCER, February 25, 1788** (Name, place of residence, age, physical description, charge): *Broke out of goal in Tolland in the night of the 9<sup>th</sup> instant, and made their escape the following persons, viz. Simeon Belknap, lately of Essington, about 60 years of age, about 6 feet high, short gray hair, light eyes, committed for costs of prosecution. Also, Knoles Shaw, a transient person, committed for counterfeiting money, a well made fellow of midling stature, about 30 years of age, pitted with the small pox, black eyes and dark hair. Whoever will take up and return said fellows to said goal, shall have Ten Dollars reward for each and necessary charges paid, by ELIJAH CHAPMAN, Jun. Sheriff. Tolland, Feb. 22, 1788.*

● **CONNECTICUT COURANT, AND WEEKLY INTELLIGENCER, April 14, 1788** (Name, place of residence, charge): *SPRINGFIELD, April 9. We hear from Chester, that on Sunday se'night, a young woman, by the name of Convas, daughter of Mr. Benjamin Convas, formerly of that place, delivered herself of a male bastard child, which to hide her misfortune from the uncharitable censures of the world, she murdered, and deposited it in a secret place---The family in which she resided, had for some time previous to the taking place of this event, been suspicious that she was far advanced in her pregnancy, but this she had ever denied, in the most positive terms--However, rising on Sunday morning, somewhat later than her usual time, and her countenance bearing an aspect which she had not heretofore discovered, the suspicions of the family now began to be strong than ever, whereupon they were led to conjecture what had happened; a search was accordingly made, and after some time, the child was found, rolled up in a bunch of tow, and put in a by-part of the house--On this discovery being made, she affirmed that the infant was still-born--upon which a jury of inquest*

*were summoned, who sat upon the body, and the purport of their verdict was, that the child was born alive, but that she inhumanly smothered it--on which she confessed the fact, and is now in safe custody.<sup>16</sup>*

● **CONNECTICUT COURANT, AND WEEKLY INTELLIGENCER, November 9, 1789**(name, charge, state of residence): *Stopped and taken from a Thief, a the house of Mr. Zechariah Allen, in East-Windsor, a dark bay mare, about eight years old, a star in her forehead, and hind foot a little white. Said thief calls his name Benjamin Lilly, of York state, and that he received the mare in Stafford of a stranger. Whoever has lost said mare may see her by applying to us the subscribers--or said thief by calling at Hartford gaol. ZECHARIAH ALLEN, ELISHA HILLS, East-Windsor, October 31, 1789.*

● **DUNLAP'S AMERICAN DAILY ADVERTISER, January 5, 1791** (name, charge, physical description, dialect): *Three Dollars Reward. Was stolen on the 31 of December 1790, out of the house of the subscriber, a great coat, a close body ditto, a pair of white rib stockings a pair of shoes and plated buckles by a certain John Jones: he is about 5 feet 8 or nine inches high, dark complexion, speaks much on the Welch dialect. Whoever takes up said thief, and secures him in any jail, so that the owner gets the Goods again, shall receive the above Reward. William Bowen, Willistown, Chester county, Jan 3 41LAW*

<sup>16</sup> See generally Lawrence M. Friedman, *Crimes of Mobility*, 43 Stan. L. Rev. 637, 654 & n.81 (1991) ("Crimes of Mobility") (citing Peter C. Hoffer & N.E.H. Hull, *MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND NEW ENGLAND 1558-1803* (1981)). By the mid-eighteen hundreds, public awareness of this problem led to legislation making it "an independent crime to conceal the birth and death of a child." *Crimes of Mobility* at 654 & n.81 (citing Lucius Q.C. Elmer, *A DIGEST OF THE LAW OF NEW JERSEY* 163 (J. Nixon 2d ed. 1855) (specific crime to "endeavor privately, by drowning or secret burying, or in any other way . . . to conceal the death of any . . . issue . . . which, if it were born alive, would by law be a bastard").



● **THE CONNECTICUT COURANT, April 18, 1791**(name, alias, charge): CHARLESTON, March 24—Yesterday between twelve and one-o'clock, was executed pursuant to his sentence, Thomas Walsh, who has been long known in this state and Georgia, by the appellation of Major Washington, for counterfeiting the indents issued by the authority of this state. . . . At a few minutes past twelve, he ascended the scaffold, attended by the officers of execution; and was assisted in his devotions by the Rev. Dr. Keating . . . to whom, as we are informed, he had confessed that his name was Walsh, and was born of respectable family in Ireland. . . He politely waived his hand to the crowd and said, 'Good day gentlemen,' then stepping forward on the dead-fall, he pulled the cap over his face, saying 'Col. Osborne, I am ready,' and was immediately launched into eternity.

● **THE CONNECTICUT COURANT, May 15, 1791** (name, town of residence, charge): *Last Monday morning, the following horrible deed was perpetrated at Windsor by Selah Sheldon, the father of three children, two sons and a daughter, the youngest aged sixteen months.—Taking the opportunity when his wife and her father were withdrawn a few rods from the house, leaving the eldest in the bed, the youngest in the cradle, and the second sitting at his foot; he came out with an axe, and aying the head of his youngest child over the side of the cradle, and after two or three strokes on its neck, as appeared by observation, cut its throat in the most awful manner. The second child in her fright ran with the tidings to her mother, who hastening into the house found her husband holding the weapon of death over the eldest son whom he had dragged from the bed to the floor—seizing instantly the axe she prevented the uplifted stroke. A jury was called who pronounced the babe to be murdered. The unnatural father was immediately taken into custody, and was permitted to attend the remains of the slaughtered babe to the meeting-house, where a Sermon adapted to the occasion was delivered by the Rev. Henry A. Rowland,*

*from Eccles. ix. 3. 'The heart of the sons of men is full of evil, and madness is in their heart while they live, and after that they go to the dead.' He was afterwards sent on by authority to be committed to the common goal to await his trial.*

## B. Public Identification of Persons Arrested — including Residence Address Information — in the Early to Mid-Nineteenth Century

As the population of the country increased throughout the early 1800s, the colonial and Ratification-era tradition of identifying arrestees continued and expanded.<sup>17</sup> The evolution of the 'penny press' which occurred during the presidencies of James Monroe, John Quincy Adams, Andrew Jackson, and Martin Van Buren, coincided with increased urbanization and formalized an earlier process through which newspapers had provided the public with event-based information about who was arrested and why:

In the late 1820s and early 1830s, the editors of New York's dailies began to turn newspaper reporting into a specialized vocation. By sending employees out into the city's courtrooms and streets, they created a new kind of journalist, one whose primary role was not that of editorial writer, but rather that of professional spectator. These "reporters", as they immediately came to be known, created something new in newspaper journalism, a daily, often exhaustive scrutinization of the spectacles and secrets of a chaotic and violent urban world. In the courtrooms of the burgeoning city, with their seemingly endless

<sup>17</sup> References to an arrestee's town or county of residence, for example, were eventually replaced with specific street address information. See *infra* at 20.

barrage of drunkards, prostitutes, and street brawlers, the newspaper reporter turned what remained an eighteenth-century journalism into one which uncompromisingly confronted the nineteenth-century metropolis. In doing so, he fostered an appetite for a journalism of revealed vices and sensations, creating a new role for the newspaperman as monitor of an urban environment that appeared increasingly uncontrollable to many of its own denizens.

Steven H. Jaffe, *Unmasking the City: The Rise of the Urban Newspaper Reporter in New York City, 1800-1850* 76 (1989) (unpublished) Ph.D. dissertation, Harvard University (on file with the Harvard University Library) ("*The Rise of the Urban Newspaper Reporter*").<sup>18</sup> As shown by accounts appearing in the penny newspapers of that era,

[t]he very act of identification — the naming of names, the listing of addresses, the description of distinguishing physical characteristics — embodied the new function that urbanization prompted journalists to perform. The reporter responded to new realities and perceptions of city life; his reports from the courtroom and the streets tacitly recognized the troubling implications of rapid and disorienting urbanization for amoral accountability and moral community. By the 1830s, an observable increase in poverty, crime, and commercialized vice — all of them consequences of the city's growth from

<sup>18</sup> As Dr. Jaffe further observed

The New York newspaper reporter emerged in the 1830s as more than merely a monitor of the proceedings of the Police Court and, through it, the city's festering slums. He also established a rhetorical identity for himself as an active crusader against urban disorder. By 1836, nine reporters covered the city's Policy Court for both penny and sixpenny dailies. *Id.* at 76.

small seaport to a position as the republic's largest metropolis — had eroded confidence in the capacity of New Yorkers for spontaneous and mutual moral regulation. Into this domain of diminished accountability stepped the reporter as a professional identifier. In the pages of the new mass-circulation press, tens of thousands of New Yorkers gained access to the transgressions and identities of the most trivial offenders as well as the most dangerous.

*Id.* at 122-23.<sup>19</sup>

A review by *amicus* IRE of the original sources confirms the observations in Dr. Jaffe's thesis that names and residence address information of arrestees was commonly made available to the public through the press.<sup>20</sup> For example, the following item appeared more than one hundred and sixty-five years ago in THE NEW YORK SUN, September 9, 1833, under the heading *City Intelligence*:

**Simon Isaacs of No. 248 Grand st.** was yesterday **arrested** by officers Sweet and Frank Smith on the following charge. In the month of November, 1832, **Israel Isaacs of No. 7**

<sup>19</sup> LAPD's erroneously asserted in its petition for a writ of certiorari that "although the press may frequently report the names of persons who have been arrested, experience suggests that such reports rarely include the arrested person's *address*" (LAPD Petition. For a Writ of Certiorari at 15). This statement is belied by historical evidence, which shows that exactly the opposite is true: nineteenth century press accounts of arrests typically included the arrested person's address (and for that matter, the victim's address as well).

<sup>20</sup> Describing the popularity of the police-court report in papers of the 1830s, Frank Luther Mott tells how a young printer named George W. Wisner "would get up early every morning and do the[] police reports" for \$4 a week. The municipal police court was held at 4 o'clock [a.m.] and Wisner "agreed to attend it regularly and write out what was interesting, besides working daytimes at setting type." AMERICAN JOURNALISM at 222.

**Division**, deposited in the cart of Simon two cases of goods, the one containing winter and the other summer clothing, each one having the card of address of Israel nailed on the cover. In December Israel sent for and obtained the case of winter good, and the following month he demanded the other case, but Simon denied all knowledge of it, declaring he had never received any such case, though it was at the time in his store. A second demand was made, with the same answer, and there the matter rested until the 13<sup>th</sup> of June last, when John Lyon, who had been in the employ of Simon Isaacs gave information to Israel on the fate of the case, which he says Simon, after the first demand, hid behind the counter, and subsequently sent off to a house in Division street, where it remained until May last, when he brought it home and sold a portion of its contents in Utica and Syracuse. On this a search warrant was issued, and the balance of the case found on the premises, together with a large quantity of cloth clothing, etc., which it is supposed he obtained in a similar manner. **He was fully committed for Grand Larceny** as the case contained upwards of \$475 worth of goods.

*Id.* at 2 (emphasis added). This type of report is representative of the contemporaneous information about arrests to which the public had access in the period when police blotters first came into common use by professional urban police departments. See *DOJ Criminal History Record Report* at 20, *supra* n. 1. Information about the prior day's arrests would appear regularly in a separate column devoted to crime reports. For example, on a Wednesday morning in the summer of 1835, New Yorkers learned of the names and residence addresses of persons arrested the day before by reviewing page 2 of their morning newspaper<sup>21</sup>:

<sup>21</sup> THE NEW YORK TRANSCRIPT, July 8, 1835, at 2.

[For the Transcript]

Police Office

Yesterday.—**Thomas Austen and Walter**, his brother, of 97 **Mott street**, and **Harmen Van Blarcam**, of 192 **Mott street**, were accused of the weighty and important offence of stealing a chain cable and an anchor--which they took away in cart--from the sloop *Volunteer*, lying at Carlisle street wharf. Remanded for further examination.

**Thomas Alborn**, of 40 **Laurens street**, was remanded for further examination on a charge of stealing a hat and handkerchief from **William Burle**, 122 **William street**.

**Mary M. Haner**, **Sarah Wellington**, **Catherine Birk**, **Henry Marshall**, and **Edward Starkey**, were brought up by **Homer, Sparks & Merritt**, from a notorious house of prostitution in **Anthony street**, near the five points, at which place a gentleman, whose name we are requested to suppress was robbed on the fourth of July, of a pocket book containing \$150--a great part of which was recovered by the officers.

**William McDow**, son of a laborer of Newburgh, said he had no place of residence, and was committed to prison as a vagrant.

**Edward Sparks**, of 300 **Bowery**, was brought up for assaulting and beating **Reuben Gondey**, of 52 **Bowery**. The parties settled their differences before they left the office.

The following persons were discharged, no witnesses appearing against them:--

**William Smith**, 258 **Madison street**, and **Stephen Wilstern** of **Waler street** (two boys) charged with sleeping, and being disorderly at an Engine house in **Walnut street**; **Joseph Brown**, carpenter, who said he lived at 22 **Greenwich street**, charged with beating his wife; **Robert Cunningham**, corner of **Fletcher street**, near **Maiden Lane**, charged with being riotous, and assaulting **John Doyle**; **Thomas C. Bruin**, 168 **Amos street**, accused of threatening



to shoot *John Wilkes*, of 137 Charles street, with a gun that he had in his hand.

Committed to Bridewell in default of sureties.--  
*Mary Corday*, in Prince street, near Elizabeth, for getting drunk; *Jerry Barrett*, 9 Walker st. for beating *Daniel Mahoney*; *Jugh Carr*, 124 Mott street, for beating his wife; *Phebe Young*, 336 Madison street, for beating *Susan Ashbey*.

Finally, a series of news articles about an infamous bigamist, thief, and alleged murderer provides compelling evidence of traditional access by the public to name and residence address information during the Jacksonian era. These articles also demonstrate how dissemination of arrest information enabled citizens to assist the police in combating criminal activity that was to thrive in the geographical and social mobility of the coming Industrial Age. See *Crimes of Mobility*, 43 *Stan. L. Rev.* at 639-44.



Vol. II      NEW YORK TRANSCRIPT      No. 85  
 New York, Monday Morning, May 11, 1835  
 (Price One Cent.)

*Foundlings*--The gross offense of leaving new born infants to the "pelting of the pitiless storm"--and the precarious chances of the stranger's humanity--has of late increased in this city to an alarming extent. Too little importance has, we regret to say, been attached, up to the present time, by the authorities, to the infamous outrages now almost daily practised--and with impunity too--by hard-hearted and unnatural parents, in the shameful disposal of their young, unoffending, and innocent offspring. Child-dropping is, and by all enlightened people in every age and nation has been considered as, a crime of the direst and most atrocious nature; and the wretch who can be convicted of committing it, ought to be subjected to the most severe punishment, and the most degrading publicity. One of the first instances, within the last

three years, of a suspected perpetrator of this species of infamy being brought to a tribunal of justice to answer for his villainy, occurred at the Upper Police Office, before Justice Palmer, on Saturday morning. A **Mr. Charles Sterling**--a man of respectable standing and appearance--residing at 178 Stanton st. was arrested on a charge of having the Thursday previous, deposited his child--five weeks old--(wrapped in a blanket and cloak)--at the door of a respectable citizen residing in his neighborhood. The accused acknowledged the infant to be his, but denied being guilty of the offence, and stated that he had placed it out at nurse, with a woman whose name he mentioned, and knew not of its present situation until informed by the officer who took him into custody. Some females who dwell near the residence of the prisoner, related several circumstances to the magistrate, going far to contradict his assertions, and he was ordered to find bail until to-day, to appear for further examination. (emphasis added)



Vol. II      NEW YORK TRANSCRIPT      No. 86  
 New York, Monday Morning, May 12, 1835  
 (Price One Cent.)

*The Atrocities of a monster developed*--Our readers are already aware, that a man named **Charles Sterling**, late of 178 Stanton street, in this city, has been arrested on suspicion of having left his infant child to the chance of death by exposure, on the steps of a house in Madison street, on Thursday last; they also know that some females (who saw the account in the appears of the child being left there,) went to the alms house and identified the child as being Mr. Sterling's, which was the cause of his arrest. . . . Sterling was kept in close confinement, at the cells of the upper police office, until five o'clock

last evening; when, through the instrumentality of the reporter for the Courier and Enquirer, another charge was brought against him of a still more heinous nature, and which, if substantiated, will send him to the state prison.

Just as the reporter was leaving the police office in the Park, he met two ladies who were enquiring where they could get a sight of Mr. Charles Sterling, who had been arrested for deserting his child. He told them that Mr. Sterling was at the upper police office, and conducted them thither. On the way one of the ladies stated that her maiden name was Elizabeth Gales, and that she was born at the town of Winthrop in Maine; and she was on a visit to Boston in the latter part of 1830, and at a Christmas party met with a person calling himself Capt. Chas Sterling.

He professed at that time to be a merchant, and after paying her some serious attentions, he made her an offer of marriage, which she accepted, and they were married in Boston, on the 27th of January, 1831. They immediately went to Winthrop, and resided for 6 months, with her relatives. He stated to her then that he had been married before, but that his first wife died at sea. After staying at Winthrop as long as it was convenient, they came to New York in July 1831.

[After he took all of her possessions and then deserted her] she never saw or heard of him, until her eye caught the paragraph in this paper yesterday morning, which caused her to go to the police office. When she reached the upper police office, Sterling was brought out of the cells, and placed in a back room; his wife went into the room, saw him, and instantly exclaimed, "That's the very man!" Sterling had the hardihood to deny all this and said he never saw her before. But on looking

over the property taken from his house by Hardenbrook and Tompkins after they arrested him, she found many articles belonging to her.

Sterling was taken back to his cell, and will probably be examined to day on this charge.

Miss Gales, above mentioned, was, as far as it known at present, Sterling's second wife. While she was still living he married a lady named Rose, of Ramapaw, 12 miles from Nynack, up the North River, by whom he got some property. She died 10 months since; and 9 months since he married a lady whose maiden name was MacGlossin; she died on Saturday se'n-night. He will now be tried for bigamy.



Vol. II NEW YORK TRANSCRIPT No. 87  
New York, Tuesday Morning, May 13, 1835  
(Price One Cent.)

*The Bigamist Sterling.*--This man was examined yesterday at the upper police office, and admitted the fact of his having married Miss Gales, as mentioned in yesterday's paper. He was fully committed for trial on the charge of bigamy, and on that of abandoning his child. . . .

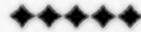


Vol. II NEW YORK TRANSCRIPT No. 89  
New York, Friday Morning, May 15, 1835  
(Price One Cent.)

*Charles Sterling again.*--Further exposures in relation to this villain's offense, continue to be made almost daily at the Upper Police Office, where he still remains in custody. Yesterday, a good looking woman, with a young child in her arms, presented herself before the magistrate and made certain communications to him respecting Sterling which will go far to prove that he at this time another wife living, in addition to the number he has already



been accused of having married, ill-treated, and deserted.



Vol. II NEW YORK TRANSCRIPT No. 93  
New York, Friday Wednesday, May 20, 1835  
(Price One Cent.)

*Sterling.*--A few days ago we stated that further accounts had been received at the Police Office of this man's villainies, and that as soon as we could publish them, without frustrating the efforts of justice, we should do so. We are now enabled to furnish our readers with the following additional particulars:--Sterling's real baptismal name is Charles Wl., and he was born at Mount Desert, in the State of Maine. Three or four years ago he lived in Boston, where he had an amiable wife and two children who, by this advising them to sail from thence to his native place in a vessel that was not sea-worthy, were drowned--he securing and absconding with all the property saved from the wreck.

When he was next heard of after this affair, he had married a handsome girl of good fortune, whom he so infamously mal-treated soon after marriage, as to compel her to leave him. The sister of this woman is still living at Port Hill. He lived for some time in Rockland Co., where he committed two petit larcenies, at the same time charging them upon other individuals, and then making his escape. Here, before he quitted, he committed a number of gross offenses, and rendered himself obnoxious to all who knew him. Subsequent to being guilty of these desperate and accumulated villainies, he seduced a young lady who now resides--with an infant eighteen months old, the fruit of their intercourse--within two miles of Bergen, in New Jersey. Two days after this, he the same place [sic]

another female became the victim of his licentiousness. This latter now resides at or near Nyack. He has, we understand, at different times, and in different places, passed himself off in the various characters of a Sea Captain, a East India Trader, a Preacher, a Doctor, a Lawyer, a Merchant, and a South Sea Whaler, and has resided at Boston, Baltimore, Bergen, Ramapaw, Mount Desert, Port-Hill, Nyack, and other places.



Vol. II NEW YORK TRANSCRIPT No. 142  
New York, Saturday Morning, July 18, 1835  
(Price One Cent.)

#### TRIAL OF STERLING

The long expected trial of this notorious culprit came on yesterday, and it having been announced by us and several of our contemporaries that such would be the case, the Court at an early hour was crowded to excess. So great, indeed, was the excitement to learn the fate of this man, that not only the Court room, but every avenue leading to it was so thronged as scarcely to leave a passage for the officers, counsel, and other persons officially in attendance. . . .

The public was already aware of the charges preferred against Sterling, viz: bigamy; desertion of his child, and manslaughter.

The charge of bigamy was brought on first, which was, that the prisoner Sterling had in the year 1831, on the 27th of January, been married to a Miss E. Gale, of Boston, by the Rev. H. Bolau, of that city; and that afterwards, in the year 1834, his former wife being still alive, he was married again to a Miss Hamilton, on the 28th July, by the Rev. Mr. Chase.

The court stated that from the evidence of the different witnesses who had appeared in court,



they were on their oaths bound to believe that the prisoner was legally and properly married on the dates mentioned, namely on the 27th of June, 1831, and afterwards during the life of his first wife, in 1834, and that under these convictions the jury must find the prisoner at the bar guilty. The jury, after a few minute's consultation, returned a verdict of guilty.

## II. DISSEMINATION OF INFORMATION TO THE GENERAL PUBLIC ABOUT THE IDENTITY OF PERSONS ARRESTED SERVES AN IMPORTANT ROLE IN THE FUNCTIONING OF THE CRIMINAL JUSTICE SYSTEM

The second prong of the Press-Enterprise II test requires an inquiry into whether dissemination of information about the identity of arrestees plays a significant positive role in the overall administration of criminal justice. Recent history indicates that it does.

First, this case differs in significant respects from *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 754 (1989). That case involved disclosure of comprehensive personal criminal history data compilations – rap sheets – pursuant to the federal Freedom of Information statute and its enumerated exemptions. Here, because the information withheld is *current* information about the identity of a person taken into police custody (e.g. name, address, race, and gender), this case concerns disclosure of fundamental facts about a core process in the administration of the criminal justice system. See *Caledonian Record Publishing Co.*, 154 Vt. at 28, 573 A.2d at 303.

[A]n arrest involve[s] a finding by a law enforcement officer that there is probably cause to believe a person has committed a crime . . . [L]aw enforcement has discretion in choosing to use the extreme power of arrest . . . . In a modern criminal justice system, it is important that the use of this discretion be exposed to public view, if only to demonstrate that the discretion is exercised in a responsible and nondiscriminatory way.

See generally Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment As a Sword*, 1980 Sup. Ct. Rev. 1, 2-3, 23 (discussing constitutional right for citizens to obtain information needed to perform constitutional duty as “ultimate sovereigns” to hold government accountable) .

Accountability in this particular instance implies more than exercising the lever in a ballot box. It also means close scrutiny of public actions and events in order to play an active role as citizens in ensuring that the laws are fairly and effectively enforced. Cf. Susan Casey-Lefkowitz, J. William Futrell, Jay Austin, Susan Bass, *The Evolving Role of Citizens in Environmental Enforcement*, 11 No. 5 NAAG Nat'l Envtl. Enforcement J. 40, 41 (1996).<sup>22</sup> One recent example of citizen oversight leading to more effective law enforcement occurred in the past year, when allegations of improper racial profiling in traffic stops on the New Jersey Turnpike led to close examination of arrest data. See John Lamberth, *Driving While Black: A Statistician Proves That Prejudice Still Rules the Road*, THE WASHINGTON POST, August 16, 1998 at C01. Statistical data by itself, however, provided only part of the story; individual accounts from arrestees were necessary to establish illegal conduct by the police. See Stephanie Saul, *Busting the Profile/Drivers Were Stopped for “Driving While Black” in N.J.*, Newsday, June 10, 1999 (details of traffic stops described by arrestees). Subsequently, the New Jersey State Attorney General launched an internal

<sup>22</sup> As the authors cogently observe:

“[p]articipation and authority are two sides of the same coin. The government that encourages broad public participation is capable of mobilizing effective popular support of its policies. Its authority is legitimate. Citizens want the state to govern effectively.

*Id.* At 40-41. See also *United States v. New York Telephone Co.*, 434 U.S. 159, 175 n.24 (1977) (“The conviction that private citizens have a duty to provide assistance to law enforcement officials when it is required is by no means foreign to our traditions”) (citing *Babington v. Yellow Taxi Corp.*, 250 N.Y. 14, 17, 164 N.E. 726, 727 (1928) (Cardozo, C.J.) (“Still, as in the days of Edward I, the citizenry may be called upon to enforce the justice of the state, not faintly and with lagging steps, but honestly and bravely and with whatever implements and facilities are convenient and at hand”).

investigation and concluded that minority motorists had been treated in a disparate fashion. See *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling* (April 20, 1999) <available at [http://www.state.nj.us/lps/intm\\_419.pdf](http://www.state.nj.us/lps/intm_419.pdf)> (visited on July 17, 1999). Ultimately, exercise of the arrest power requires confident support of the people that it will be ‘exercised vigorously but with unbending adherence to fairness and law.’ See *Final Report of the State Police Review Team* (July 2, 1999) (Available at <[http://www.state.nj.us/lps/rpt\\_ii.pdf](http://www.state.nj.us/lps/rpt_ii.pdf)> (visited on July 17, 1999).

Finally, the stigma of an arrest and “the unofficial sanction of public ostracism” are competing interests worthy of consideration in connection with dissemination of even current, event-based arrest records. See *Woznicki v. Erickson*, 202 Wis.2d 178, 187, 549 N.W.2d 699, 703 (Wis. 1996) (“legitimate concern for the reputations of citizens is a matter of public interest”) (citing *Newspapers, Inc. v. Breier*, 89 Wis.2d 417, 430, 279 N.W.2d 179 (1979)). However, “[a]n arrest is not a “private” event,” *Effective Law Enforcement*, 23 Kan. L. Rev. at 8, and Congress and numerous state legislatures have taken steps to protect the employment interests of individual arrestees without derogating the First Amendment interests of all citizens. *Id.* at 21 (“many claims of privacy, if accepted would be established at the expense of other competing values”). See, e.g., Consumer Reporting Employment Clarification Act of 1998, amending Fair Credit Reporting Act, 15 U.S.C. § 1601, *et seq.*

## CONCLUSION

For the foregoing reasons, the judgement of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted

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IN THE  
**Supreme Court of the United States**

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LOS ANGELES POLICE DEPARTMENT,

*Petitioner,*

v.

UNITED REPORTING PUBLISHING CORP.,

*Respondent.*

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit**

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**BRIEF AMICI CURIAE OF THE REPORTERS COMMITTEE FOR  
FREEDOM OF THE PRESS, AMERICAN COURT AND  
COMMERCIAL NEWSPAPERS, INC., AMERICAN SOCIETY OF  
NEWSPAPER EDITORS, AND THE NATIONAL NEWSPAPER  
ASSOCIATION IN SUPPORT OF RESPONDENT**

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IN THE  
**Supreme Court of the United States**

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No. 98-678

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LOS ANGELES POLICE DEPARTMENT,  
*Petitioner,*

v.

UNITED REPORTING PUBLISHING CORP.,  
*Respondent.*

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit**

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**BRIEF AMICI CURIAE OF THE REPORTERS COMMITTEE FOR  
FREEDOM OF THE PRESS, AMERICAN COURT AND COM-  
MERCIAL NEWSPAPERS, INC., AMERICAN SOCIETY OF  
NEWSPAPER EDITORS, AND THE NATIONAL NEWSPAPER  
ASSOCIATION IN SUPPORT OF RESPONDENT**

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**INTEREST OF AMICI CURIAE**

Journalists depend on the First Amendment, state open records acts and the federal Freedom of Information Act (FOI Act) to obtain information from and about government agencies. The media in turn provide the public with information that allows public participation in self-government. Journalists also depend on primary source materials contained in government



databases, such as address information, as an indispensable resource for investigative reporting. Many others, from scholars to community leaders to ordinary citizens, rely upon open records laws to gain access to information for myriad uses. In the case at hand, the government asserts that it may properly restrict access to address information contained in arrest records based on the requester's identity and intended use of the information. A ruling by this Court that accepts this argument would dangerously threaten the tradition of access embodied in the state and federal open records laws.

*Amici* believe that § 6254(f)(3) of the California Government Code is at odds with the majority of federal and state freedom of information laws. Further, the statute's language creates dangerous ambiguities with regard to the classification of records requesters. Not only does the statute threaten both the press' and public's traditional access to arrest records, but it also discriminates against commercial users of the information. Therefore, because of the threat posed by the statute to public records access, *amici* submit this brief in support of the Respondent, United Reporting Publishing Corporation.<sup>1</sup>

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working reporters and editors, dedicated to defending the First Amendment and freedom of information interests of the news media and the public. The Reporters Committee has provided representation, legal guidance, and research in virtually every major press

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<sup>1</sup> Pursuant to Sup. Ct. R. 37.6, counsel for *amici* authored this brief in total with no assistance from the parties. Additionally, no individuals or organizations other than *amici* made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk pursuant to Sup. Ct. R. 37.3(a).

freedoms case that has been litigated in the United States since 1970. As a special project, the Reporters Committee sponsors the Freedom of Information Service Center, which daily advises reporters on issues of access to government records and proceedings.

The American Court & Commercial Newspapers (ACCN) was founded in 1930 to maintain the integrity of public notice and focuses on issues of concern to legal and business newspapers throughout the country. A member-driven non-profit trade association, ACCN is comprised of approximately 80 newspapers in cities throughout the United States. Newspapers belonging to ACCN are committed to reporting those facts and information essential to readers in their marketplaces and communities, frequently drawing on public records, including case filings, real estate transactions, court opinions, and other public information sources.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 850 members who hold positions as directing editors of daily newspapers throughout the United States and Canada. The purposes of the Society, which was founded more than 75 years ago, include the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people. ASNE is committed to the proposition that, pursuant to the First Amendment, the press has an obligation to provide the citizenry of the country with complete and accurate reports of the affairs of government – be they executive, legislative, or judicial.

The National Newspaper Association, established in 1885, is a not-for-profit trade association representing the owners, publishers and editors of America's community newspapers.

NNA's mission is to protect, promote, and enhance America's community newspapers. Today, NNA's nearly 4,000 members make it the largest newspaper association in the United States. NNA works closely with policy officials to create a legal and regulatory environment conducive to the growth of community newspapers. NNA believes that the public's right of access to public information should be guaranteed and should not be restricted based on the intended use of the information.

### STATEMENT OF THE CASE

*Amici* adopt the Respondent's Statement of the Case.

### SUMMARY OF ARGUMENT

California's Public Records Act sets forth minimum standards for access to government records<sup>2</sup> and declares that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in the state." Cal. Gov't Code § 6250 (West 1999). However, the statute at issue, California Government Code § 6254(f)(3), conflicts with this provision by expressly barring the release of arrestee address information to requesters who seek to use the information for a commercial purpose.

In *United Reporting Publishing Corp. v. California Highway Patrol*, 146 F.3d 1133 (9th Cir. 1998), the Ninth Circuit declared the latter statutory provision to be an unconstitutional restriction on commercial speech. Applying this Court's four-part test to determine the constitutionality of government restrictions on commercial speech as laid down in

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<sup>2</sup> A state or local agency may adopt requirements for itself which allow greater access to records than prescribed by the minimum standards set forth in the California Public Records Act. Cal. Gov't Code § 6253.1 (West 1999).

*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) and its progeny, the appellate court determined that § 6254(f)(3) was unconstitutional because it failed to "directly and materially" advance the government's interest.

California has proffered a number of interests, including the protection of privacy, that it asserts justify this statute. In fact, not one of these asserted interests is directly and materially advanced by § 6254(f)(3). The statute is riddled with exceptions which undermine the purported interests which the law was enacted to protect.

The statute raises other substantial concerns as well. It bears little resemblance to many federal and state open records laws. Open records laws are not enacted for the benefit of specific users, but for the benefit of the public. The principle of broad accessibility to public records – regardless of the identity of the requester, and regardless of intended use – is the norm and not the exception. California's statute draws distinctions based on the intended use of the information, favoring certain requesters, while barring others because they seek the information for a disfavored purpose. Such distinctions run contrary to this nation's tradition of access.

Even assuming *arguendo* that the identity of the requester is relevant, the California statute is so vague that it is impossible to determine who falls within the categories of acceptable users and who does not in any consistent manner. For example, journalists – both traditional and nontraditional – must interpret a statute which is riddled with ambiguity and backed by substantial penalties for noncompliance. In particular, ambiguous language renders it difficult to distinguish between the press and commercial users. When cautious requesters who are uncertain of their status choose not to request the information,

government oversight is diminished.

Although the ambiguity in § 6254(f)(3) stems from the California Legislature's failure to provide definitions for key terms, this Court should refrain from adopting definitions to clarify the statute. To do so would run contrary to previous holdings in *Lovell v. Griffin, Ga.*, 303 U.S. 444 (1938) and its progeny.

This Court should affirm the Ninth Circuit's ruling. This will reinforce the appellate court's correct application of the *Central Hudson* test, and also uphold and promote this nation's long tradition of access to public records and information.

### ARGUMENT

#### I. RIGHTS OF ACCESS TO ARREST RECORDS BASED ON THE INTENT OR IDENTITY OF THE REQUESTER RUN CONTRARY TO THE OPEN RECORDS LAWS OF MANY STATES AND THE FEDERAL GOVERNMENT. SUCH DISTINCTIONS SHOULD NOT BE RELEVANT IN DETERMINING WHETHER ACCESS IS GRANTED.

Prior to July 1, 1996, California Government Code § 6254 provided that "state and local law enforcement agencies shall make public . . . the full name, current address, and occupation of every individual arrested by the agency." Cal. Gov't Code § 6254(f) (West 1995). This provision made arrestee addresses available to anyone for any purpose. The Legislature's 1995 amendment of the Public Records Act, allowed requesters to obtain the address of any arrested individual only after declaring under penalty of perjury that the request was made for a "scholarly, journalistic, political, or governmental purpose."

Cal. Gov't Code § 6254(f)(3) (1998).<sup>3</sup> Licensed private investigators also were permitted access for "investigative purposes." § 6254(f)(3). The revised statute expressly barred release to requesters seeking the information for commercial purposes. Moreover, requesters were prohibited from using address information "directly or indirectly" to sell a product or service. Although purporting to preserve the public's right to know, § 6254(f)(3) forecloses the access rights of certain requesters, thus silencing this speech. The only explanation for this is that the Legislature disliked the requesters' intended speech.

#### A. California looks to the federal FOI Act for guidance, but § 6254(f)(3) of the California Public Records Act bears no resemblance to the federal act's broad access provisions.

The California Public Records Act, as revised, radically departs from many other state and federal laws which make no

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<sup>3</sup> As amended, Cal. Gov't Code § 6254(f)(3) provides that:

[S]tate and local law enforcement agencies shall make public the following information . . .

(3) [T]he current address of every individual arrested by an agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request was made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator . . . , except that the address of the victim of [certain specified crimes] shall remain confidential. Address information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals and the requester shall execute a declaration to that effect under penalty of perjury.



distinctions based on a requester's identity or intended use of government records. The federal Freedom of Information Act, to which California looks for guidance when construing the provisions of its Public Records Act, requires that requesters be treated uniformly with regard to rights of access.<sup>4</sup> The FOI Act dictates whether records are accessible to the public, and does not delineate which members of the public may have access.

Under federal law, "any person" may request records under the FOI Act. 5 U.S.C.A. § 552(a)(3) (West 1999). As defined in § 551(2) of the act, "any person" encompasses an "individual, association, or public or private organization other than an agency." Courts construing this provision have extended it to include a wide range of diverse parties. Observing that the language in 5 U.S.C.A. § 551 on its face did not restrict rights under the FOI Act solely to United States citizens, this Court and others have noted that Congress intended to provide broad access to the public at large, and not limit access solely to certain designated members of the public. See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Doherty v. Department of Justice*, 596 F. Supp. 423, 426 (S.D.N.Y. 1984), *aff'd*, 775 F.2d 49 (2nd Cir. 1985); *O'Rourke v. Department of Justice*, 684 F. Supp. 716, 718 (D.D.C. 1988). The only apparent exception to this broad grant of access is a judicially implemented bar preventing fugitives from justice from "call[ing] on the resources of the court to adjudicate" a claim under the FOI Act. *Doyle v. Department of Justice*, 494 F.

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<sup>4</sup> The California Supreme Court has stated that "the judicial construction and legislative history of the federal act serve to illuminate" the interpretation of its California counterpart. *American Civil Liberties Union of Northern California, Inc. v. Deukmejian*, 32 Cal. 3d 440, 447 (Cal. 1982); see also *Black Panther Party v. Kehoe*, 42 Cal. App. 3d 645 (Cal. Ct. App. 1974).

Supp. 842, 843 (D.D.C. 1980), *aff'd*, 668 F.2d 1365, 1365-66 (D.C. Cir. 1981)(refusal to entertain claim unrelated to FOI Act provisions), *cert. denied*, 455 U.S. 1022 (1982).

Furthermore, under the FOI Act, requests can be made for any reason whatsoever. No showing of "relevancy" is required. *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989). This Court has held that a FOI Act requester's basic rights of access "are neither increased nor decreased" by virtue of having a greater interest in the records than that of an average member of the general public. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 143, n. 10. Moreover, requesters need not explain or justify their requests, because the purpose for which records are sought "has no bearing" upon the merits of the request. *Id.*<sup>5</sup>

With specific exception for "first party" requesters,<sup>6</sup> a requester's identity or intended use of the information does not affect the determination of whether the information requested is released under the FOI Act. The relevance of identity or

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<sup>5</sup> See also *North v. Walsh*, 881 F.2d 1088, 1096 (D.C. Cir. 1989)(rejecting requester's identity and intended use as factors for determining access rights under the FOI Act); *Durns v. Bureau of Prisons*, 804 F.2d 701, 706 (D.C. Cir. 1986), *cert. granted, judgment vacated on other grounds & remanded*, 486 U.S. 1029 (1988); *Forsham v. Califano*, 587 F.2d 1128, 1134 (D.C. Cir. 1978).

<sup>6</sup> However, this Court has observed that a requester's identity can be significant with regard to the application of a privilege under Exemption 5. It noted that "there is good reason to differentiate between a governmental claim of privilege for presentence reports when a third party is making the request and such a claim when the request is made by the subject of the report." *United States Dep't of Justice v. Julian*, 486 U.S. 1, 14 (1988); accord *Reporters Comm.*, 489 U.S. at 771 (recognizing single exception to FOI Act-disclosure rule in case of "first party" requester).

intended use is limited to procedural issues such as expedited access or fee calculation. Unlike the California statute, the FOI Act allows commercial users to request government information on exactly the same terms as any other requester, although such requests are subject to a separate fee structure from that assessed for requests from educational or noncommercial scientific institutions or representatives of the news media.<sup>7</sup> In short, neither a requester's identity nor purpose substantially affect *access* rights under the FOI Act.

**B. Section 6254(f)(3) also radically departs from the majority of state open records laws.**

As Congress did with the federal FOI Act, many state legislatures also have adopted or expressed, as a matter of policy, the proposition that broad access to records is an essential component of participatory democracy.<sup>8</sup> At least seven states have enshrined a right of access in their state constitu-

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<sup>7</sup> 5 U.S.C. § 552(a)(4)(A)(ii). The designation of a requester as a commercial user under the FOI Act turns on the use to which the information will be put, rather than on the identity of the requester. See 28 C.F.R. § 16.11 (1998) (defining commercial use as "a use or purpose that furthers [the requester's] commercial, trade, or profit interests.").

<sup>8</sup> Delaware's Freedom of Information Act declares that "it is vital that citizens have easy access to public records in order that the society remain free and democratic." Del. Code Ann. tit. 29, § 10001 (Michie 1997). Illinois declares that the right to inspect public records "is necessary to enable the people to fulfill their duties of discussing public issues fully and freely." Ill. Comp. Stat. ch. 140/1 § 1 (1998). See also Mich. Comp. Laws § 15.231 (1997), N.H. Rev. Stat. Ann. § 91-A:1 (1990), N.Y. Pub. Off. Law § 84 (West 1998), Or. Rev. Stat. § 192.001(1)(b) (1999), Va. Code § 2.1-340.1 (1999), Wis. Stat. § 19.31 (1999), and Vt. Stat. Ann. tit. 1, § 316(a) (1997).

tions.<sup>9</sup>

Many states do not distinguish between requesters' rights of access based on identity or interest.<sup>10</sup>

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<sup>9</sup> Four do so explicitly. They are Louisiana, Montana, New Hampshire, and North Dakota. See La. CONST. art. XII, § 3, Mont. CONST. art. II, § 9, N.H. CONST. pt. 1, art. 8, and N.D. CONST. art. XI, § 6. The Tennessee Legislature's source of authority to enact an open meetings law derives from its state constitution, which provides: "That the printing presses shall be free to every person to examine the proceedings of the legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof." Tenn. CONST. art. 1, § 19. Utah law states that the legislative intent behind its records law creates a constitutional right of access. The Government Records Access and Management Act expressly recognizes "two constitutional rights: (a) the public's right of access to information concerning the conduct of the public's business; and (b) the right to privacy in relation to personal data gathered by governmental entities." Utah Code Ann. § 63-2-102(1) (Michie 1993). Vermont recognizes a constitutional right of access to government meetings only. Vt. CONST. art. 6.

<sup>10</sup> For example, in Iowa, the open records act does not limit access based on the purpose of the request. Iowa Code § 22.2(1) (1998). North Carolina and Oregon provide that "no person . . . shall be required to disclose the purpose or motive for the request." N.C. Gen. Stat. § 132-6(b) (1997) and Or. Att'y Gen. PUB. RECORDS AND MEETINGS MANUAL, § 1(A) (1995).

Courts in several jurisdictions have made similar findings. The Michigan Supreme Court has ruled that the state's public records act does not require a person to justify requests for access. See *State Employees Ass'n v. Dep't of Management and Budget*, 404 N.W.2d 606 (Mich. 1987). In New Hampshire, the state supreme court held that "every citizen" is entitled to access to public records and that a right to the information is not dependent on a demonstration of need. *Mans v. Lebanon School Board*, 290 A.2d 866, 867 (N.H. 1972). See also *Walsh v. Barnes*, 541 So.2d 33, 35 (Ala. Civ. App. 1989); *Dunhill v. Director, District of Columbia Dept. of* (continued...)



The same tradition of access to arrest records exists in most states. A minority of states have chosen to deny commercial users access to arrest records. They are Arizona, California, Florida, Georgia, Maryland, New York, New Mexico, Rhode Island, and Texas.<sup>11</sup> However, of those state statutes that have been challenged, only Colorado's statute has survived constitutional scrutiny.<sup>12</sup> See *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir. 1994), *cert. denied*, 513 U.S. 1044 (1994).

<sup>10</sup>(...continued)

*Trans.*, 416 A.2d 244, 246-47 (D.C. 1980), *Techniscan v. Passaic Valley Water Comm'n*, 527 A.2d 490, 492 (N.J. App. Div. 1987), *MacEwan v. Holm*, 359 P.2d 413, 418 (Or. 1961), *Ryan v. Pa. Higher Educ. Assistance*, 448 A.2d 669, 670 (Pa. Commw. Ct. 1982).

<sup>11</sup> See Ariz. Rev. Stat. § 28-667 (West 1998); Cal. Gov't Code § 6254(f)(3) (West 1999); Fla. Stat. chs. 119.105, 316.650 (1998), Ga. Code Ann. §§ 33-24-53, 35-1-9 (Michie 1998); Md. Code Ann., State Gov't § 10-616 (1999); N.M. Stat. Ann. § 14-2A-1 (Michie 1998); N.Y. Pub. Off. Law § 89 (West 1998), R.I. Gen. Laws § 38-2-6 (1997) and Texas Bus. & Com. Code Ann. § 35.54 (1998).

<sup>12</sup> See Cal. Gov't Code § 6254 (Deering 1997), invalidated by *United Reporting Publishing Corp. v. California Hgwy. Patrol*, 146 F.3d 1133 (9th Cir. 1998), *aff'd* 946 F. Supp. 822 (S.D. Cal. 1996); Fla. Stat. ch. 316.650 (1998), ch. 316.650(11) invalidated by *Babkes v. Satz*, 944 F. Supp. 909 (S.D. Fla. 1996); Ga. Code Ann. §§ 33-24-53, 35-1-9 (Michie 1998), § 33-24-53(c) invalidated by *Statewide Detective Agency v. Miller*, No. 96-Civ.1033 (WBH), Order (N.D. Ga. Aug. 12, 1998); § 35-1-9 invalidated by *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994), *on remand*, 864 F. Supp. 1294 (N.D. Ga. 1994); N.M. Stat. Ann. § 14-2A-1 (Michie 1998), invalidated by *Lavalle v. Udall*, Civ. A. No. 94-0404-M, Order, (D.N.M. Feb. 16, 1996); and Tex. Bus. & Com. Code Ann. § 35.54 (West 1998), invalidated by *Innovative Database Sys. v. Morales*, 990 F.2d 217 (5th Cir. 1993). The Arizona, Maryland, New York, and Rhode Island statutes have not yet been challenged.

In *Lanphere*, the Tenth Circuit upheld a Colorado statute prohibiting access to criminal justice records by those who intended to use them for commercial purposes, finding that the statute did not unconstitutionally restrict commercial speech. Even so, the Tenth Circuit's decision was criticized by dissenting Judge Aldisert, who wrote:

[T]he issue is not whether Colorado is obliged to provide a client base to [a law firm] or required to furnish a source of news to El Paso County News. Rather, the question is to what extent may it deny public access, irrespective of the motivation for access, so long as the motivation is not for an unlawful purpose. In my view, a desire for pecuniary gain in the world's strongest capitalist society operating under a democratic political system has not yet been declared unlawful, offensive, or unconstitutional."

*Id.* at 1519-20 (Aldisert, J. dissenting).

Although a handful of states deny commercial users access to arrest records, the remainder do not. More typical are the regulations of the Massachusetts' Public Records Supervisor, which prohibit a records custodian from inquiring into why a requester seeks access and which provide that the access to government records for commercial purposes is perfectly proper. See Mass. Regs. Code tit. 950 §§ 32:05(1), (5) (1997). Similarly, North Carolina and Oregon laws require arrestee address records to be disclosed. See Or. Rev. Stat. § 192.501 (1998) and N.C. Gen. Stat. § 132-1.4(c)(2) (1997). Neither state bars access for commercial users of those records. Some states charge commercial users higher fees that "reasonably reflect" the cost of supplying the records, thus addressing the cost concerns that underlie the drafting of § 6254(f)(3). See Minn. Stat. Ann. § 13.03(3) (1999) (reasonable fees for information



with commercial value may reflect development costs); Minn. Stat. Ann. § 13.82(2)(j) (West 1999); Okla. Stat. Ann. tit. 51 24-A.5(3), 24-A.8(A)(1)(1998).

Some laws do not explicitly indicate whether access to arrestee address information for commercial purposes is permitted. Some, like Indiana's, state that designated lists of names and addresses "may not be disclosed by public agencies to commercial entities for commercial purposes." Indiana Code § 5-14-3-4 (Burns 1997). However, arrestee address information is not among the categories whose disclosure is barred. *Id.* See also Ark. Code Ann. § 25-19-105 *et seq.* (Michie 1998), Ohio Rev. Code tit. 1, § 149.43(B),(E) (1998).

California's statute is clearly in the minority, demonstrating that the state's decision to bar access to arrest records for certain purposes is an anomaly.

## **II. UNDER THE REVISED STATUTE, IT IS DIFFICULT TO DETERMINE WHO FALLS WITHIN THE CATEGORIES OF ACCEPTABLE USERS AND WHO DOES NOT.**

Section 6254(f)(3), as amended, permits access to arrestee information for "scholarly, journalistic, political, or governmental purposes," but fails to define those terms. It also fails to define what constitutes "indirectly" selling a product or service. These ambiguities raise significant questions of statutory interpretation and pose a threat to access on two points.

First, it is unclear whether records custodians will recognize that a nontraditional requester – who may not be as immediately identifiable as a beat reporter from a local newspaper or television station – is motivated by a "journalistic" purpose. Records custodians and law enforcement officials, without guidelines to clearly demarcate the boundaries of the "proper"

purposes set forth in the statute, could easily discriminate against requesters based on their subjective assessment of the requester's purpose. As surveys of records law compliance have repeatedly indicated, government officials can, and do, deny requesters records that are clearly public.<sup>13</sup> Asking records custodians to apply unclear laws can only make a bad situation worse.

Second, and perhaps more importantly, in the absence of guidance, requesters are left to determine for themselves whether their purpose is permissible. For many requesters, this will be intimidating, because a wrong guess renders them vulnerable to criminal sanctions. Given the substantial penalties that accompany violations of the act, cautious requesters who are uncertain of their status will choose not to request the information at all, thus depriving themselves, and ultimately, the public, of this important information.

Section 6254(f)(3) requires requesters to declare under penalty of perjury that they are seeking records for a permissible use. However, the use to which the records will be put may not always be clear at the time of the request. Requesters who may not fall clearly into one category or another must surmise whether the statute will be held to apply to them. Those unwilling or unable to satisfy themselves that the statute will protect them will be tempted to forego access to the records,

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<sup>13</sup> See generally Susan Brown, *Police Frequently Hinder Access to Public Records*, Indianapolis Star, Jan. 31, 1999, at 1.; Ross Cheit, et al., *Open or Shut? Access to Public Information in Rhode Island's Cities and Towns*, Brown University, April 28, 1999; Geoff Dutton, *Government in the Sunshine*, Daytona Beach Sunday News-Journal, Jan. 17, 1999, at 1A.

rather than risk prosecution for perjury.<sup>14</sup>

**A. The statute provides little guidance for distinguishing between the press and commercial users.**

With the rise of nontraditional journalistic outlets such as the Internet, it is increasingly difficult for a requester or records custodian to determine whether the contemplated use of the records constitutes a "journalistic purpose" under the statute. In both theory and practice, it is unclear whether the Legislature intends the term to apply only to the traditional press, or if the term encompasses nontraditional media as well.<sup>15</sup>

In cases where the requester and the end user of arrestee address information are not the same entity, the line between permissible and impermissible use blurs further. The transfer of information from the government to end users can often involve many interim parties. For example, journalists frequently rely on information brokers as sources for information that is too time-consuming to gather or requires research skills which they lack. Information services also can analyze and digest large quantities of government data, often revealing trends or patterns that may not be visible in a mass of raw data. These brokers

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<sup>14</sup> Under the California Penal Code, perjury is punishable by imprisonment in a state prison for two, three or four years and by fines. Cal. Penal Code §§ 126, 672 (West 1999). Furthermore, under California's perjury law, the requester is admonished that "an unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false." Cal. Penal Code § 125 (West 1999).

<sup>15</sup> It is also unclear whether the statute prohibits members of the creative community, such as film scriptwriters or authors of fiction, from obtaining arrestee address records for purposes such as contacting suspects to gather anecdotal information or other background to develop fictional works.

typically are engaged in for-profit activity. As enacted, § 6254(f)(3) makes no provision whatever for situations where a commercial information broker is acting at the behest of a newspaper or scholar. The commercial broker must guess whether it may obtain such records legally by effectively adopting its client's intent as its own, or whether it is barred from seeking the information because it does so as part of a for-profit transaction.

The statute also fails to account for the fact that requester may wish to make multiple uses of the information. For example, it is permissible for a scholar or journalist to seek arrestee address information in order to conduct research on areas where suspects live, and publish the information wholesale. A separate party may then make commercial use of the scholar's published information, apparently without triggering the punitive provisions of the statute. Yet, a single requester could not seek to use the information for both commercial and noncommercial uses without running afoul of § 6254(f)(3).

Although not expressly recognized by the court below, *amici* contend that United Reporting Publishing Corporation engages in noncommercial speech.<sup>16</sup> Using arrestee address

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<sup>16</sup> The Ninth Circuit has recognized that mixed-speech/commercial activities can implicate the First Amendment. In *Gaudiya Vaishnava Society*, the Ninth Circuit held that where the sale of merchandise bearing political, religious, philosophical, or ideological messages "is inextricably intertwined," with other forms of protected expression (like distributing literature and proselytizing) "the entirety must be classified as noncommercial and we must apply the test for fully protected speech." *Gaudiya Vaishnava Soc'y v. San Francisco*, 952 F.2d 1059, 1064 (9th Cir. 1990), *cert. denied*, 504 U.S. 914 (1992). See also *One World One Family Now v. Honolulu*, 76 F.3d 1009 (9th Cir. 1996) (restriction upheld on different grounds) (Pregerson, J. dissenting), *cert. denied*, 117 S.Ct. 554 (continued...)

records, Respondent publishes its newsletter, the *JAILMAIL Register*. It then distributes the newsletter to both its clients and arrestees. Respondent's clients use the information for many purposes, including sending free literature to arrestees offering such services as legal consultation and substance abuse counseling. The *JAILMAIL Register* also includes articles on these same topics. If § 6254(f)(3) is upheld, United Reporting Publishing Corporation will be barred from obtaining information even though it is being used for a permissible purpose, as well as one that could be classified as commercial.

**B. This Court traditionally has been reluctant to define "press." Any decision interpreting the statute's classification of requesters should broadly interpret what constitutes a "journalistic purpose."**

If this Court chooses to address the ambiguities in the statute, it should be mindful of its previous interpretations of "the press." Historically, this Court has been reluctant to define who is and who is not "the press."

Sixty-one years ago, this Court noted in *Lovell v. Griffin, Ga.*, that "the liberty of the press is not confined to newspapers and periodicals," noting that "it necessarily embraces" such formats as pamphlets and leaflets. 303 U.S. 444, 452 (1938). In striking down an ordinance banning the distribution of "circulars, handbooks, advertising, or literature of any kind" as facially unconstitutional, Chief Justice Hughes stated that "the press in its [historic] connotation comprehends every sort of publication which affords a vehicle of information and

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<sup>16</sup>(...continued)

(1996). Despite these decisions, the courts below decided the issue on commercial speech grounds and not under a higher level of scrutiny.

opinion." *Id.* at 452. Similarly, in *Mills v. Alabama*, Justice Black wrote that "the Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs." 384 U.S. 214, 219 (1966). This broad construction was further developed in dicta in *Branzburg v. Hayes*, noting the existence of an "informative function" by the press. 408 U.S. 665, 703-04 (1972). Writing for the Court, Justice White noted that:

[L]iberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods. Freedom of the press is a "fundamental personal right" which "is not confined to newspapers and periodicals . . . . The informative function asserted by representatives of the organized press in the present case is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists."

*Branzburg*, 408 U.S. at 703-705 (internal citation omitted).<sup>17</sup>

Justice White again recognized the "informative function" language in *Herbert v. Lando*, noting that the press and broadcast media have played "a dominant and essential role" in serving that end. 441 U.S. 153, 189 (1979). *See also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 767 n. 4 (1985) (White, J. concurring). Similarly, in his concurrence in *First National Bank of Boston v. Bellotti*, Chief Justice

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<sup>17</sup> In its footnote for the preceding paragraph, the Court warned that "by affording a privilege to some organs of communication but not to others, courts would inevitably be discriminating on the basis of content." *Branzburg*, 408 U.S. at 705, n. 40.



Burger noted the Court's broad approach to the scope of Press Clause protection, and citing *Branzburg* and *Lovell*, observed that the "informative function" is performed by more than just the "traditional" media. 435 U.S. 765, 801-02 (1978) (Burger, C.J., concurring). Lower courts have also followed suit.<sup>18</sup>

In the context of fee waivers and other benefits, the federal FOI Act also reflects this Court's focus on whether the party in question performs an informative function. The statute provides that a "representative of the news media" is part of a category of requesters entitled to certain automatic fee benefits,<sup>19</sup> and the term refers to any person actively gathering information of current interest to the public for an entity that is organized and operated to publish or broadcast news to the general public.<sup>20</sup> At least one federal circuit court has extended this definition, holding that a private research archive is a "representative of the news media" within the meaning of the statute because its intent to gather, edit, and disseminate the information to the

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<sup>18</sup> In those cases where the federal circuits have defined "press" for such purposes as determining to whom journalists' privileges apply under state shield law, they have followed this Court's lead. In *von Bulow v. von Bulow*, the Second Circuit Court of Appeals held that in order to invoke the journalist's shield laws, the person seeking to invoke the privilege must intend to use material – sought, gathered, or received – to disseminate information to the public and such intent must exist at the inception of the newsgathering process. 811 F.2d 136 (2nd Cir. 1987), *cert. denied*, 481 U.S. 1015 (1987). *Von Bulow* was later adopted by the Ninth Circuit in *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993). Considering a similar issue, the Ninth Circuit adopted the Second Circuit's language and stated that "the critical question . . . is whether [the journalist] is gathering news for dissemination to the public." *Id.* at 1293.

<sup>19</sup> 5 U.S.C.A. § 552(a)(4)(ii)(II).

<sup>20</sup> See 28 C.F.R. § 16.11 (b)(6) (1998).

public was akin to that of the other news media sources. *National Sec. Archive v. United States Dept. of Defense*, 880 F.2d 1381 (D.C. Cir. 1989), *reh'g en banc denied*, No. 88-5217 (D.C. Cir. Sept. 26, 1989), *cert. denied*, 494 U.S. 1029 (1990). In other words, like this Court, the D.C. Circuit looked to purpose, rather than affiliation, in deciding whether to uphold the grant of the fee benefit.

If this Court elects to define or clarify § 6254(f)(3)'s "scholarly, journalistic, political, or governmental purposes," it should do so broadly, with an eye toward providing maximum access, mindful of the broad construction it has given to definitions of "the press."

### III. THE STATUTE FAILS TO SATISFY CENTRAL HUDSON BECAUSE THE STATE'S ASSERTED INTEREST OF PROTECTING PRIVACY IS NOT DIRECTLY AND MATERIALLY ADVANCED BY § 6254(f)(3).

The California Legislature enacted § 6254(f)(3) for two express purposes: to reduce the expense borne by law enforcement agencies in responding to requests, and to protect the privacy of California citizens.<sup>21</sup> However, the district court found that the statute did not advance the state's interest in protecting the privacy of its residents, because it permitted

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<sup>21</sup> The district court noted the statute's legislative history. To wit:

From a law enforcement perspective, the processing of requests puts a tremendous strain on already scarcely allocated time and resources. From a consumer perspective, this is an invasion of privacy. While these records are justifiably public in many ways, the unsolicited direct mail advertisements are unwarranted.

Legislative History (June 4, 1996 letter), p.4., *quoted in United Reporting Publishing Corp. v. Lungren*, 946 F. Supp. 822, 826 (S.D. Cal.) (1996).

"much more persuasive invasions of privacy" such as allowing the information to be published in a newspaper or to be obtained by the arrestee's personal enemies or employers. *United Reporting Publishing Corp.*, 946 F.Supp. 822, at 827-828.

On appeal, the government has revamped its asserted interests, limiting it to protecting the privacy of arrestees and victims and preventing the creation of "unreliable criminal history information banks." The Ninth Circuit rejected both of these contentions, holding that the many exceptions to the statute undermined the statute's stated intent to protect privacy and rendered it unconstitutional. *United Reporting Publishing Corp. v. Lungren*, 146 F.3d 1133, 1140 (9th Cir. 1998). It also found that the state presented no evidence that unreliable criminal information banks would be created. It concluded that the asserted harm was "no more than speculation and conjecture and was insufficient to sustain a commercial speech restriction." *Id.* at 1138-39.

Petitioner argues before the Court that the California statute advances the state's interest in protecting the privacy of arrestees and victims "by eliminating the greatest potential for dissemination of their home addresses." Pet. Brief at 31. Further, it claims that the statute reduces the level of solicitation of arrestees and prevents employers and other commercial entities from using the arrestees' status against them. *Id.* at 32. Finally, it claims a dual interest in both protecting privacy and keeping the public informed. None of these interests is advanced by the statute.

**A. Section 6254(f)(3) fails to directly and materially advance the state's asserted interests in protecting privacy.**

Assuming for the sake of argument that Respondent is

engaged in commercial speech, § 6254(f)(3) cannot satisfy this Court's *Central Hudson* requirements.<sup>22</sup> This litigation has focused on the third of the four factors set forth in *Central Hudson*, which requires any restriction on commercial speech to directly and materially advance the asserted governmental interest.<sup>23</sup> This Court has held that a statute cannot materially advance the government's interest when exceptions to the regulation serve to undermine that interest. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995). *See also Greater New Orleans Broadcasting Assoc. v. United States*, \_\_\_ U.S. \_\_\_, No. 98-387 (June 14, 1999).

Even if the state had a substantial interest in protecting an arrestee's privacy right in his address information, the statute does not directly and materially advance this interest.<sup>24</sup> The

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<sup>22</sup> As this Court cautioned in *44 Liquormart*, the need to show that a regulation will advance a substantial interest "directly" and to "a material degree" is particularly compelling where the "drastic nature of its chosen means" is the "wholesale suppression of truthful, nonmisleading information." *44 Liquormart, Inc. v. Rhode Island*, 134 L.Ed.2d 711, 728 (1996).

<sup>23</sup> The test set forth in *Central Hudson* requires that:

[1] At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [2] Next we ask whether the asserted government interest is substantial. [3] If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest. *Central Hudson*, 447 U.S. at 566.

<sup>24</sup> It is unclear whether a constitutional right to privacy extends to address records. In a case soon to be before this Court, the Fourth Circuit (continued...)

many exceptions to the statute are fatal to the state's asserted interests because they provide for the widespread dissemination of information that the state otherwise seeks to restrict. Petitioner argues that the statute advances the state's interest in protecting the privacy of arrestees and victims "by eliminating the greatest potential for dissemination of their home addresses." Pet. Brief at 31. In fact, the statute allows a wide range of requesters to disseminate arrestee address information. Address information may be published in every newspaper and broadcast across the state by television and radio stations. Scholars are free to publish address information in scholarly journals. Political figures and government agencies may contact arrestees or publish the information on the Internet where it may be seen worldwide. Licensed private investigators, perhaps hired by intimates of the arrestee, potential employers or a neighborhood watch, may freely seek and disseminate address information. In short, the statute allows for the dissemination of the information to almost every conceivable sphere of the arrestee's life, including the arrestee's family, home, and

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<sup>24</sup>(...continued)

Court of Appeals stated no constitutional right of privacy exists with respect to information contained in driver's licensing and automobile registration records – including addresses. *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1999), *certiorari granted*, *Reno v. Condon*, No. 98-1464, May 17, 1999. Although the *Condon* panel invalidated the Driver's Privacy Protection Act on federalism grounds, the majority expressly stated that neither the Supreme Court nor any federal appellate court has ever found that there is a right to privacy in the information contained in driver's records.

The *Condon* court was persuaded that "the same type of information is available from numerous sources. 'As a result, an individual does not have a reasonable expectation that the information is confidential.'" *Condon*, 155 F.3d at 464-65. "In sum, the information found in motor vehicle records is not the sort of information to which individuals have a reasonable expectation of privacy." *Id.*

workplace. It is hard to see how Petitioner can base its restrictions on access on the claim that "total public disclosure" will follow from Respondent's publication, when existing exceptions to the statute allow the same result.

Petitioner also asserts that the statute discourages solicitation of arrestees and victims, thereby preventing them from feeling a sense of personal violation arising from knowledge that address information about them is on commercial mailing lists.<sup>25</sup> Pet. Brief at 31. But Petitioner is confusing access with subsequent conduct. As the Petitioner notes, commercial publishing services are free to use alternative means of gathering the same information to achieve the same result it alleges the statute prevents. Commercial publishers may freely search newspapers or the airwaves to compile the same information. They may also comb the Internet or scholarly publications. In the end, the statute does not prevent commercial mailing list services from using arrestee address records. It simply makes gathering the information more cumbersome.

Arguments that the statute will prevent employers and other commercial entities from using the information against arrestees are equally specious. Petitioner asserts that § 6254(f)(3) serves the state's interest in protecting arrestees from discrimination. Pet. Brief at 32. However, the statute allows employers to retrieve the same information from the press, the

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<sup>25</sup> Petitioner misinterprets the nature of the arrestee's privacy interest. The invasion of privacy occurs upon the uncovering of the information and not upon the receipt of further information generated as a result of the invasion. *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1978). A statute barring the dissemination of information for some uses while allowing its release for others simply cannot serve a privacy interest.



Internet, or a private investigator.<sup>26</sup>

**B. Petitioner has failed to recognize the value of Respondent's communication.**

Finally, Petitioner claims that the statute serves the dual purpose of both protecting privacy and keeping the public informed. As the courts below have noted, the statute does not advance this purpose because it allows the release of the information in many different ways. Petitioner's assertion accords no worth to United Reporting Publishing's communication, erroneously assuming that commercial publishing services and newsletters play no role in informing the public. Those who have received this information from Respondent and its colleagues are testimony to the contrary.

As noted *supra*, pamphlets and newsletters have long played an important role in providing important news and information to the public. These publications have also been afforded First Amendment protection under the Press Clause. Because they often target a specific audience, newsletters and pamphlets are a highly effective means of communicating timely information to an audience. These publications often report on areas of specific public concern in a more in-depth manner than other mass media. Such publications may even accomplish the goal of informing the public more effectively than other "traditional" media outlets such as daily newspapers or radio and television broadcasts which may not report the information in as detailed a manner. If § 6254(f)(3) is upheld, the public will be left to rely on other, less-specialized media outlets to obtain arrestee information, and the public's need for

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<sup>26</sup> Petitioner apparently assumes, contrary to the presumption of innocence afforded by our Constitution, that a presumption of guilt attaches upon arrest.

information may go unmet.

**IV. THE STATUTE UNDERCUTS THE SUBSTANTIAL PUBLIC BENEFIT PROVIDED BY OPEN RECORDS AND ALLOWS FOR ARBITRARY GOVERNMENT DISCRIMINATION AGAINST REQUESTERS.**

Journalists have long used open records laws to reveal information about law enforcement activities. A 1999 Pulitzer-prize winning *Washington Post* series examining disproportionately high numbers of shootings by the city's police officers prompted the U.S. Department of Justice to review dozens of fatal shootings by city police, and spurred the police department to dramatically improve training requirements. The series made extensive use of such sources as police records, FBI homicide records, and records of firearm discharges by D.C. officers.<sup>27</sup>

Following the alleged rape of a visiting businesswoman by an airport shuttle van driver, the *Boston Globe* obtained information about two previous arrests on the suspect's record from the state's public safety office. When the *Globe* confronted the suspect's employer, it admitted it had not checked the suspect's arrest record, claiming it did not believe it had the right to gain access to the records. The shuttle company then promised to change its policy and check the criminal backgrounds of all its drivers in the future.<sup>28</sup> Several years earlier,

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<sup>27</sup> See Jo Craven et al. *Deadly Force: An Investigation of D.C. Police Shootings*, *Washington Post*, Nov. 15-19, 1998, at A1; Cheryl W. Thompson, *Outline for Review of Police Shootings*, *Washington Post*, Jan. 29, 1999, at B1; and Jo Craven, *Questioning the Cops*, *Columbia Journalism Review*, March/April 1999, at 26.

<sup>28</sup> Ellen O'Brien & Joanna Massey, *Rape Suspects Record Easily* (continued...)

the same newspaper used arrest records to demonstrate that, despite the prevailing local belief, blacks were arrested no more frequently than their white neighbors in South Boston.<sup>29</sup>

Other newspapers have investigated whether drunk drivers go unpunished or whether drug lords block urban renewal efforts in an inner-city neighborhood.<sup>30</sup> In short, newspapers, both large and small, use arrest records and other criminal justice records to serve the public interest.

Not only journalists and their readers benefit from public access to arrest records. The California courts have long recognized that it is in the public's interest to identify adults charged with crimes and to put other citizens on notice of those arrests. *Loder v. Municipal Court*, 553 P.2d 624, 628 (Cal. 1976), *cert. denied*, 429 U.S. 1109 (1977). Not only does access encourage transparency in the criminal justice system, it promotes the system's efficiency as well. Publication of arrestee address records can prevent cases of mistaken identity by encouraging those who can provide potential alibis to come forward. Scholars may use the information to map those areas where arrestees live to determine whether there are links between physical location and arrest rates. Through the use of mailing addresses, publishers such as Respondent may provide

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<sup>28</sup>(...continued)

*Obtainable*, Boston Globe, May 12, 1999, at A1.

<sup>29</sup> Indira A.R. Lakshmanan, *Blacks, Whites Arrested at Same Rate in S. Boston*, Boston Globe, Oct. 30, 1994, National/Foreign, at 1.

<sup>30</sup> Jim Haner, *When a Drug Lord is your Landlord*, Baltimore Sun, Feb. 14, 1999, at A1; David Fallis, *Drunk Driving: A Sobering Look*, Tulsa World, Jan. 1999, special reprint; and George Pawlacyzk, *On the Road Again: Illinois' Hidden DUI Deals*, Belleville News-Democrat, April 25-27, 1999 (on file with counsel).

arrested persons with information vital to protecting their rights, including their constitutional right to counsel.

Much will be lost if this Court upholds § 6254(f)(3). The statute favors some categories of requesters and discriminates against others. By focusing on a requester's intended use of the information – for a scholarly, journalistic, political, or governmental purpose, or for investigation purposes by a licensed private investigator – it creates categories of access rights, discriminating between those engaged in speech it approves of and those whose speech it dislikes.

Although the statutory language focuses on the requester's intended *use* of the information, it restricts *speech* based on the way it is packaged and disseminated. *See* footnote 17, *supra*. Petitioner claims that no alternative to § 6254(f)(3) exists and that, if the statute is declared unconstitutional, legislatures will move to block access to all arrest records. However, alternatives to closure do exist.<sup>31</sup> The Legislature could have considered targeting the conduct it disliked, and not the speech leading to it. If the Legislature fears discrimination based on the use of arrest records, it should ban this type of discrimination.<sup>32</sup> California has not chosen to do so. Instead, it banned access to

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<sup>31</sup> Although the Legislature enacted the statute partly out of concern for the expense of providing records, it could have met its goal of conserving funds by following the path chosen by other states which provide for a separate pricing structure, charging commercial requesters a fee reasonably calculated to recoup the additional costs (if any) associated with their requests.

<sup>32</sup> At present, California law prohibits employers from asking job applicants to disclose information about arrests or detentions which did not result in conviction. Employers also are prohibited from using such information with regard to hiring, promotion, termination or participation in apprenticeship programs. Cal. Labor Code § 432.7 (a) (1998).

records by those who would use them for certain disfavored purposes. Upholding § 6254(f)(3) would signal to legislatures across the land that they may restrict access to public records based on a requester's intended use of the information. If this ban is sustained, one is left to wonder what restrictions on access to long-public records will follow.

### CONCLUSION

Section 6254(f)(3) of the California Government Code is an aberration. It stands apart from similar state and federal laws and threatens the press' and public's traditional access to arrest records. Its application is unclear and its purported purpose undermined by exceptions. If allowed to stand, the statute will deprive the public of important information by discriminating against requesters whose purpose in seeking access, although legal, is disfavored. The solution to the "problem" perceived here is not to close off access to arrest records. It is to address and regulate the conduct which follows from further dissemination of already public information.

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IN THE  
**Supreme Court of the United States**

LOS ANGELES POLICE DEPARTMENT,

*Petitioner,*

v.

UNITED REPORTING PUBLISHING CORPORATION,

*Respondent.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF *AMICUS CURIAE* THE DIRECT MARKETING  
ASSOCIATION IN SUPPORT OF RESPONDENT**

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This brief is respectfully submitted pursuant to Rule 37 urging that the Court affirm the decision below of the United States Court of Appeals for the Ninth Circuit.<sup>1</sup>

### **INTEREST OF AMICUS CURIAE**

The Direct Marketing Association ("DMA") is a trade association incorporated under the Not-For-Profit Corporation Law of the State of New York. Its members are companies engaged in or associated with marketing goods and services through direct response methods, which include, quite importantly, the use of information gained from public sources. Its membership numbers more than 4,000 companies located in all 50 states and more than 50 foreign countries, the great majority of which would, in one way or another, be affected by the judicial approval of a restrictive statute concerning information used for marketing purposes.

DMA members represent every functional level of industry — manufacturing, wholesale and retail. As direct marketing techniques are used by each of them as an integral part of conducting their respective businesses in direct-to-the-consumer selling, any statute that abridges those vehicles of commercial speech must have a significant and direct impact on DMA's membership. Neither DMA nor its members have any interest in, nor would they condone, any activity that truly invades personal privacy. However, what Petitioner and *amici* aligned with Petitioner hold out as the laudable pursuit of privacy protection does not survive scrutiny and creates the potential for inadvertent suppression of public benefit, constitutionally protected speech and the free flow of information, the lifeline of direct marketing.

### **SUMMARY OF ARGUMENT**

Direct-to-the-consumer marketing has become a prominent and enormously important form of commerce in the United

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1. Counsel for both Petitioner and Respondent have consented to the participation of *Amicus*, as evidenced by letters filed with the Supreme Court pursuant to Rule 37. No party wrote or financially contributed to the preparation of this brief.

States. It has contributed significantly to the growth of the country's overall economy. Section 6254(f)(3) would preclude that form of selling with respect to California arrestees. There is no compelling state interest in doing so. Section I.

Marketing and commerce were such an integral part of the growth of America in colonial times that First Amendment rights fully protected commercial speech in the same manner that they protected non-commercial speech. Nothing has changed that would alter that initial intent of the Framers. Section II, A.

The receipt of unsolicited commercial messages containing potentially valuable information to the recipient does not constitute an invasion of privacy. No industry has engaged in as comprehensive and far-reaching self-regulation to protect consumer privacy as the direct marketing industry has. There is no demonstrated harm in receiving unsolicited commercial offers. Section II, B.

When considering the arguments proffered by Petitioner in support of Section 6254(f)(3)'s prohibition against the use of arrestee information for commercial purposes and the factors that Respondent relies on to demonstrate the constitutional infirmity of Section 6254(f)(3), it becomes clear that the Ninth Circuit's decision should be affirmed. Not only is there no privacy right violated in allowing arrestee information to be used for commercial purposes, but also the First Amendment requires that such discrimination not be tolerated. Section III, A and B.

Because privacy protection and avoiding potential harm to consumers are not available as valid state interests upon which to justify restricting commercial speech, and because one cannot separate access from use where, as here, information resides in only one place and therefore is not accessible elsewhere, Section 6254(f)(3) fails to satisfy the requirements of the First Amendment. Section III, B and C.

## ARGUMENT

### I. The Value of Direct Marketing

In the most comprehensive study of its kind, conducted by the WEFA Group<sup>2</sup>, the effect of direct marketing on the economy was shown to be dramatic, pervasive and growing more rapidly than the economy in general. Since 1992, the WEFA Group has been commissioned each year to analyze the impact of direct marketing on the U.S. economy. WEFA's most recent results show that U.S. sales revenue attributable to direct marketing was nearly \$1.4 trillion in 1998. *Economic Impact: U.S. Direct Marketing Today Executive Summary 1998*, The WEFA Group, October 1998 at 8. Revenues attributable to direct mail solicitation alone were nearly \$430 billion. *Id.*

Those enormous revenue figures translate into a similarly impressive and significant impact on other areas of the economy. Among the most notable is employment. It is estimated that more than 24.6 million people are employed as a result of direct marketing, with 7.1 million of them in the direct mail industry. *Id.* at 11.

In both the revenue and employment categories, California leads the rest of the states by large margins, with more than \$150 billion in sales and in excess of 1.5 million employed in 1998. *Id.* at 8, 11. Direct marketing not only has a substantial impact on California's economy, it has a demonstrated acceptance level second to none. It is somewhat ironic, therefore, that a California statute attempts to impose a value judgment that is so clearly contradicted by the actions and preferences of its own citizenry. Indeed, it does so without demonstrating any form of harm that would result were commercial use of arrestee information to be permitted.

It is important to bear in mind the many economic and social benefits of direct marketing. An ever increasing number of

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2. The WEFA Group is a prominent economic forecasting organization that was formed in 1987 as a result of the merger between Chase Econometrics and Wharton Economic Forecasting Associates.

businesses — large and small — are turning to this form of marketing to sell products and services. It is an effective and efficient way to communicate information about available goods to targeted audiences.

The benefits to consumers are many. This increased activity has intensified competition, leading to broader consumer choices and sharper competitive pricing. For example, direct mail — including cataloging and an infinite variety of promotions — provides consumers with more specific information on product characteristics, prices and other valuable information than any other major advertising medium.

For many consumers — particularly those who reside away from major metropolitan areas — shopping direct provides special opportunities to seek a wider selection of products than would otherwise be available.

Finally, and most importantly, direct marketing provides maximum convenience because of the virtues of shopping at home. Needless to say, this benefit is of particular significance to the elderly as well as to the increasing number of families with both heads of household working.

There is no demonstrated harm, and much benefit, in allowing marketers to contact arrestees with offers of goods and services that may be of interest, indeed vital, to them. At very least, arrestees themselves should be allowed to choose what they receive and to decide for themselves whether or not it interests them. The state should not preempt that communication process. There is no state interest in banning the commercial use of arrestee information that would allow this form of selling.

## II. Nature and History of Direct Marketing

### A. The Original Understanding of the First Amendment Was That Truthful Commercial Messages Are Fully Protected<sup>3</sup>

Benjamin Franklin, the first important printer in colonial America, published a catalog in 1744 of “near six hundred volumes in most faculties and sciences.” Perhaps the then-novel Quaker idea of selling goods at the same price to everyone induced Franklin to print the following statement on the cover: “Those persons who live remote, by sending their orders and money to said B. Franklin, may depend on the same justice as if present.” Franklin’s catalog is remarkable for, among other reasons, its early formulation of what was later to become the basic mail-order concept of customer satisfaction guaranteed. The names of Washington, Jefferson, and Franklin in this early genesis of direct marketing are an indelible reminder of how deep its roots are in the history and character of the American people. N. Ross, *A History of Direct Marketing* (1992).

The standard colonial newspaper was almost half-filled with local advertising. L. Wroth, *The Colonial Printer* 234 (1938). To illustrate, in 1766 Hugh Gaine’s *New York Mercury* was 70% advertising, and 55% of the *Royal Gazette* was commercial matter. A. Lee, *The Daily Newspaper in America* 32 (1937).<sup>4</sup>

3. For a fuller development of this topic, fully documented with historical and legal citations, see D. Troy, “Advertising: Not ‘Low Value’ Speech,” 16 *Yale Journal on Regulation* 85 (1999). This section of *Amicus*’s brief appears with the permission of Mr. Troy.

4. The majority of the ads which appeared in colonial newspapers would today be considered “commercial speech.” K. Middleton, *Commercial Speech in the Eighteenth Century, Newsletters to Newspapers: Eighteenth Century of Journalism* 277 (D.H. Bond & W.R. McLeod, eds., 1977) (“The colonial press regularly carried reputable medical ads, as well as those for books, cloth, empty bottles, corks, and other useful goods and services.”) Without these ads, the colonial press so important to the Revolutionary cause would not have existed. During the eighteenth century, like today, “[a]dvertising represented the chief profit margin in the newspaper business.” *Id.* at 56.



"Advertisements had as much interest as the news columns, perhaps greater interest. . . . Arrival of a new cargo . . . likely was what the man, home from a reading at the coffee house or tavern, talked about at his fireside rather than the reception of a new envoy at some court in Europe." F. Presbrey, *The History and Development of Advertising* 154 (1929).

The first daily newspaper in the United States was established in 1784 primarily as a medium for advertising. When the *Pennsylvania Packet and General Advertiser* initially appeared, ten of its sixteen columns were filled with advertisements. Presbrey, *supra*, at 161. The name of this paper (as well as that of New York's first daily, *The New-York Daily Advertiser*) reflected the common understanding that commercial advertisements were as much a part of the news of the day (and the purpose of the press) as reports of government activity. The Boston, New York and Philadelphia newspapers, like most dailies in those years, "used page one for advertising, sometimes saving only one column of it for reading matter." Mott, *America Journalism - A History of Newspapers in the United States through 250 Years: 1690-1960*, 157 (3d ed. 1963).

The full integration of editorial and commercial matters in the press reflected the colonial view that the benefits of freedom of expression extended to the entire spectrum of human endeavors. For example, among the reasons given by the Continental Congress to settlers in Quebec for the importance of a free press was "the advancement of truth, science, morality, and arts in general." Address to the Inhabitants of Quebec (1744), reprinted in B. Schwartz, 1 *The Bill of Rights: A Documentary History* 223 (1971). This view encompassed commercial communications as well. For example, Richard Henry Lee of Virginia — perhaps the leading Anti-Federalist — said in his demand for a bill of rights that "a free press is the channel of communication to mercantile and public affairs. . . ." Letter XVI of R.H. Lee, January 20, 1788, in *An Additional number of Letters from the Federal Farmer to the Republican*

151-53 (1962) (emphasis added), reprinted in *Freedom of the Press from Zenger to Jefferson: Early American Liberation Theories* 144 (Leonard Levy, ed., 1966).<sup>5</sup>

Thus, the generation of the Framers understood the value of commercial messages. As the prominent printer-historian Isaiah Thomas, editor of a "violently pro-Revolutionary" newspaper, wrote:

[Advertisements] are well calculated to enlarge and enlighten the public mind, and are worthy of being

5. The twin concepts of freedom of speech and of the press were considered as two sides of the same coin, serving the same purposes, and were often referred to interchangeably. As the Virginia Gazette said on May 18, 1776, "The use of speech is a natural right . . . [and] [p]rinting is a more extensive and improved kind of speech," quoted in Miller, *George Mason: Gentleman Revolutionary* 148 (emphasis in original). Thus, this Court has treated the freedom of speech and press as coterminous. See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 781-83 (1978).

The constitutions of the several states reveal the interchangeable nature of the terms to describe the identical sets of rights. For example, Pennsylvania's 1776 Declaration of Rights stated: "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." Pa. Const. art. XII (1776), quoted in 5 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 3083 (F. Thorpe, ed., 1909) (emphasis added). See also B. Schwartz, 2 *The Bill of Rights: A Documentary History* 658 (1971) (reporting proposed Bill of Rights adopted at the Pennsylvania ratifying convention of 1787, using almost identical language).

Tellingly, Thomas Jefferson's proposed modification to Madison's initial draft of the First Amendment provided that "[t]he people shall not be deprived or abridged of their right to speak, to write, or otherwise to publish anything but false facts. . . ." 15 *The Papers of Thomas Jefferson* 367 (J. Boyd ed. 1958) (emphasis added). See also L. Levy, *Legacy of Suppression* 174 (1960) ("[F]reedom of speech and freedom of the press, being subject to the same restraints of subsequent punishment were rarely distinguished. Most writers, including Addison, Cato, and Alexander, who employed the term 'freedom of speech' with great frequency, used it synonymously with 'freedom of the press'".

enumerated among the many methods of awakening and maintaining the popular attention, with which more modern times, beyond all preceding example, abound.

*History of Printing in America with a Biography of Printers, and an Account of Newspapers* (1810), quoted in D. Boorstin, *The Americans: The Colonial Experience* 328, 415 (1958).

Given the prevalence and importance of commercial messages in colonial America, it is not surprising that the very idea of "the freedom of speech, or of the press" evolved in close connection with the development of advertising. In fact, one of the best-known statements in defense of the freedom of expression was written in response to an attack on a commercial message printed by Benjamin Franklin. In 1731, Franklin printed an advertising notice for a ship's captain. The ad was not part of a newspaper; it was distributed as a stand-alone commercial handbill. The paper simply "propose[d] a commercial transaction," *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 760 (1976) (quoting *Bigelow v. Virginia*, 421 U.S. 809, 822 (1975)), by seeking additional freight and passengers for the captain's ship. At the bottom of the ad was the note "No Sea Hens nor Black Gowns will be admitted on any Terms." *An Apology for Printers*, *The Pennsylvania Gazette*, June 10, 1731, reprinted in *2 Writings of Benjamin Franklin* 172, 176 (1907).

This handbill outraged the local clergy (the "Black Gowns"), although it is unclear whether they were more offended by their exclusion from the pool of desirable passengers or from their placement in the same category as women of ill repute ("Sea Hens"). In response to attacks on the ad, Benjamin Franklin published his *Apology for Printers* which, at that time, was "[b]y far the best known and most sustained colonial argument for an impartial press." S. Botein, *Printers and the American Revolution in The Press and the American Revolution* 20 (B. Bailyn & J. B. Hench, eds., 1980). Franklin's *Apology* contended that "Printers are educated in the Belief that when

Men differ in Opinion, both Sides ought equally to have the Advantage of being heard by the Publick." *An Apology for Printers*, reprinted in *2 Writings of Benjamin Franklin* at 174.<sup>6</sup> The incident illustrates that, at least to Franklin, the "Opinions" stated even in advertisements should be "heard by the Publick." Thus, America's first sustained defense of freedom of expression, and of the very notion of a "marketplace of ideas," came in response to an attack on commercial speech.<sup>7</sup>

The First Amendment sprang from this background. Its authors were accustomed to the idea that commercial speech had important practical value. Their regard for free expression had been critically shaped by Franklin's defense of a commercial handbill. Thus, when the First Amendment provided categorical protection for freedom of expression without any halfway house for commercial speech, it must be understood to have meant what it said and to have extended its full protection to truthful commercial discourse.<sup>8</sup>

6. This echoed the sentiment in *Cato's Letters*, that "Whilst all Opinions are equally indulged and all Parties equally allowed to speak their Minds, the Truth will come out." J. Trenchard & T. Gordon, 3 *Cato's Letters* 295 (1733). Compare *Abrams v. United States*, 250 U.S. 616, 630 (1919) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market") (Holmes, J., dissenting).

7. In addition, one of the major precipitating events of the American Revolution also involved a defense of commercial messages. The Stamp Act of 1765 taxed each newspaper — and imposed an additional two-shilling tax on each advertisement. "This was a heavy tax in proportion to the value of the item being taxed," and galvanized the colonial press against the British government. J. Lofton, *The Press as Guardians of the First Amendment* 2 (1980). The opposition of newspapers to the Stamp Act of 1765 was in large part, if not primarily, based on their concern that it encroached on the freedom of expression. A. Schlesinger, *Prelude to Independence: The Newspaper War on Britain 1764-1776* 70-82 (1966).

8. Of course, the government may ban the dissemination of false or misleading commercial messages. See, e.g., *Friedman v. Rogers*, 440 (Cont'd)



### B. Self-Regulation

Section 5 of Federal Public Law 93-579, as amended by Public Law 95-38, June 1, 1977, 91 Stat. 179 (codified as a note to 5 U.S.C. § 552a), provided for the establishment of a Privacy Protection Study Commission ("PPSC") composed of seven members, three appointed by the President of the United States, two appointed by the President of the Senate, and two appointed by the Speaker of the House of Representatives.

One of the PPSC's initial and principal directives was to report to the President and the Congress on whether those engaged in interstate commerce who maintain mailing lists should be regulated by federal law. After much deliberation, based on many months of hearings and thousands of pages of testimony, the PPSC concluded that they should not be.

The PPSC's principal reason for reaching the conclusion it did was that "the balance that must be struck between the interest of the individuals and the interest of mailers is an especially delicate one" (Report of the Privacy Protection Study Commission at page 147). The PPSC recognized and respected

(Cont'd)

U.S. 1, 15-16 (1979). This may be true either because, by definition, such messages are excluded from the First Amendment or because the government is always presumed to have a compelling interest in preventing deception. In any event, such a view comports with the original understanding of the First Amendment, which was adopted against the background of a venerable common-law tradition prohibiting commercial misrepresentation. See W. Blackstone, 3 *Commentaries on the Laws of England* 431 (1768); J. Story, *Equity Jurisprudence* §§ 191, 192 (1836); W. Walsh, *A History of Anglo-American Law* 328-29 (1932) (tracing development of action of deceit from mid-fourteenth century). The government may therefore police the veracity of commercial speech, whereas its ability to regulate "false" or misleading political speech, for example, is far more constrained. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("under the First Amendment there is no such thing as a false idea"). Accordingly, regulation of false or misleading speech under laws such as the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq.* (1988), is not unconstitutional.

the importance of direct mail to non-profit organizations, to the champions of unpopular causes and to the many organizations that create diversity in American society. It never seriously doubted the substantial economic significance of direct mail marketing.

In supporting its finding that no legislation or regulation was needed in the mailing list arena, the PPSC showed great respect for the testimony provided by the Postal Service through its then Director of the Office of Product Management, who told the PPSC:

We can find no evidence that the present use of mailing lists in the direct-marketing process constitutes a significant or peculiar invasion of privacy. The economic pressures of the marketplace provide mailers with a strong incentive to direct their advertisements away from those individuals who might find them annoying. By its very nature, direct mail must be aimed at individuals who have some desire to receive it. Moreover, the recipient of unwanted mail matter has the option of throwing it away. Indeed, an individual probably finds it easier to avoid reading his mail than to escape from any other form of advertising.

Testimony of United States Postal Service, Mailing Lists Hearings, December 11, 1975, at 253-54, incorporated into the Report of the Privacy Protection Study Commission at 149.

Good business practices demand that mailers be responsive to their customers' wishes. No one wants a dissatisfied customer, and no one wants to mail to an individual who is not likely to be responsive. Mailing lists provide the means by which to reach the right audience — people who are interested in getting the message.

The PPSC thus concluded that voluntary self-regulation by the industry, in the form of providing adequate means for people to have their names removed or withheld from lists, was



the appropriate action, not governmental regulation. Established and effective vehicles to that end are DMA's Mail Preference Service and Telephone Preference Service, discussed below, as well as individual mailers' name removal options which provide customers an opportunity not to have their names placed on mailing lists.

The industry's first codification of guidelines came in the mid 1960s with the Guidelines for Ethical Business Practice. Those guidelines, or "codes" as they were called at the time, contained twelve suggested practices for direct marketers to conduct business in an ethical manner. Since that time, the concept of guidelines for the industry has evolved dramatically. Today, the Guidelines For Ethical Business Practice and its companion guides contain articles covering every aspect of a direct marketing promotion, from the development of a list, to the fulfillment of an offer.

The guidelines were developed to exemplify the industry's commitment to conduct its business in an ethical manner. They also are meant as living documents to be utilized as part of a company's business philosophy. Requirements that an offer not violate a consumer's perception of his or her right to privacy is just one of the results of how the concepts behind industry standards are incorporated into the operating procedures of successful direct marketing companies.

In general, the guidelines provide individuals and organizations involved in direct marketing with principles of conduct that are accepted nationally and internationally. Those guidelines reflect DMA's and the industry's long-standing commitment to high levels of ethics and responsibility to the consumer and to the community. They are also part of DMA's philosophy that self-regulatory measures are preferable to governmental mandates. Self-regulatory actions are more readily adaptable to changing techniques, economic and social conditions, and technology and encourage wide-spread use of sound business practices.

The guidelines are enforced by a representative industry committee that reviews promotions in view of the requirements of the guidelines. The committee receives "cases" from consumer advocacy groups, other members of the industry, government and law enforcement agencies, and individual consumers. After the committee follows an elaborate due process procedure in administering the guidelines, the accused violator either changes its ways or faces referral to a law enforcement agency (where the guideline violation also constitutes a violation of law) and, in the case of a DMA member, referral to DMA's board of directors (which may vote for censure, suspension or expulsion from DMA). This self-regulatory process has been enormously successful over the years in getting those companies that have strayed from the letter and spirit of the law and guidelines to change their ways voluntarily.

DMA always has been sensitive to the issue of consumer privacy expectations. While some of DMA's programs have evolved with the ever-growing recognition of the importance of consumer expectation in the privacy area, one of DMA's activities in that area has been in place since 1971 — its widely promoted Mail Preference Service ("MPS") — which provides the means by which individuals may have their names removed from mailing lists.

MPS helps to provide the means to implement consumer choice by allowing individuals who have expressed a desire to have their names removed from unsolicited national mailings to achieve that goal. Typically, national mailers who are about to send their messages to prospects they believe will be receptive to them obtain the MPS computer tapes, compare the names on their prospect lists to those on the MPS tapes and delete those names that match. In that way, MPS provides an individual with the opportunity to get off mailing lists. Since its inception, millions of individuals have requested that their names be removed. DMA encourages and closely monitors MPS usage, seeing to it that as many firms as possible use the service, while

at the same time assuring proper usage through an effective decoy system.

Section 6254(f)(3) eliminates arrestees' right to receive important, albeit commercial, information and removes their freedom of choice by making for them the decision not to receive offers containing valuable information. No arrestee will receive pertinent information or offers because the statute prevents it. Rather than allowing each arrestee the freedom to accept or reject an offer that s/he is entitled to receive, the statute prevents any marketer from learning about an arrestee's need for a particular good or service and, therefore, from providing it.

Effective July 1, 1999, the industry, through DMA, made its Privacy Promise to America. Under that national self-regulatory program, cleared by the Federal Trade Commission, direct marketers are obligated to give notice to their customers before any identifying information about them is transferred to another marketer, and to honor all requests to "opt out" of the marketing process, *i.e.*, not to have their names and addresses transferred. Additionally, marketers are required to subscribe to DMA's Mail Preference Service, and corresponding Telephone Preference Service, which mandate the removal from prospect lists all consumers that have signed up with those free services. In other words, before a marketer will attempt to contact or solicit a prospect, it will run its prospect list against DMA's Mail Preference Service or Telephone Preference Service tapes and will delete all matches, inasmuch as the names on those tapes represent consumers who have chosen not to receive national advertising solicitations from companies with which they do not already enjoy a business relationship.

DMA is unaware of any other industry that has a self-regulatory privacy protection program of the scope and magnitude of the Privacy Promise. It is hard to imagine another industry or profession that goes to the lengths that the direct marketing industry does in order to protect consumer privacy.

It is against that backdrop that the arguments of Petitioner and its *amici* must be measured. It is difficult to understand

how a statute that allows the public disclosure of arrestee identifying information to be published in newspapers or used by private investigators can be viewed as not violating or invading arrestees' privacy, while at the same time viewing the mere receipt of commercial information that may prove valuable to the recipient, and is seen or heard only by the recipient, as such an invasion. The obvious and unavoidable conclusion is that such discrimination is based on the fact that the prohibited messages contain commercial, rather than non-commercial, speech. Section 6254(f)(3) is not content-neutral in that the use to which the arrestee information is to be put defines its content. It is only commercial use, *i.e.*, commercial speech, that is blocked.

### III. Balancing Commercial Free Speech With The Right to Privacy

Much, if not most, of Petitioner's arguments, as well as the arguments of *amici* aligned with Petitioner, are bottomed on the assumption that certain members of the public are more offended, in the context of their personal privacy, by receiving commercial communications or information regarding goods and services that may be of interest to them than they are by having private investigators, journalists and members of the press disclose their identities and whereabouts for public gaze. Although this Court is not being asked to determine the accuracy or wisdom of those underlying assumptions, it is being asked to protect the constitutional rights of those who would initiate a commercial communication as well as those who would receive those communications but for Section 6254(f)(3). The history of direct marking in the context of the socio-economic growth of the United States makes it abundantly clear that the American public places great importance on the ability to communicate and receive commercial information.

One cannot separate "access" from "use." Accessing information does not occur in a vacuum. The only thing that distinguishes one person's accessing information from another's is the use to which it is put. Any argument that the statute does



not discriminate based on the content of speech rings hollow inasmuch as it is the intended use of the information that defines the content of the corresponding communication.

Mere invocation of the emotionally charged buzzword "privacy" cannot justify discriminating between commercial and non-commercial speech. Petitioner attempts to justify the discriminatory provision of the statute by deeming commercial speech "disfavored" and attempting to elevate other uses of information to a loftier position. That distinction was never intended by the Framers. Section II A, *supra*. There can be no clearer case of discrimination than is presented here by the statute's singling out one form of speech for favored treatment over another.

Moreover, Petitioner's argument that the statute could have banned all uses of arrestee information, not just commercial use, is an argument that has been widely criticized in the past. See, e.g., A. Kozinski and S. Banner, *Who's Afraid of Commercial Speech*, 76 Va. L. Rev. 627 (1990); P. Kurland, *Posadas de Puerto Rico v. Tourism Co.*: "'Twas Strange, 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wonderous Pitiful'", 1986 Sup. Ct. Rev. 1. It was also repudiated in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 762-63 (1988). ("[T]hat ['greater-includes-the-lessor'] syllogism is blind to the radically different constitutional harms inherent in the 'greater' and 'lessor' restrictions . . . [A] law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship.") (footnote omitted).

Petitioner cannot have it both ways.

Thus even the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record.

*Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495-96 (1975).

As the Court has observed: "[o]nce the truthful information was 'publicly revealed' or 'in the public domain' the court could

not constitutionally restrain its dissemination." *Smith v. Darby Mail Publ'g Co.*, 443 U.S. 97, 103 (1979). Cf., *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 630 (1995) (allowing time restriction, not outright prohibition, before members of the Bar could contact victims or relatives "while wounds are still open").

#### A. The Nature Of A Constitutional Right To Privacy

The issue with which the Court is concerned relates to the responsible use of information for a commercial purpose and whether such use, as Petitioner contends, violates individual rights of privacy and, if so, to what extent. Although it would seem an inescapable prerequisite to any such argument that there be a clear concept of what is meant by "right of privacy," such a concept is lacking.

The constitutional right of privacy, on which the Court has expounded in earlier cases, is not one found or defined as such in the Constitution itself. Rather, as cogently analyzed in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), it is a "penumbra" or "zone" attaching to other Bill of Rights guarantees.

Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which the government may not force him to surrender to his detriment. The Ninth Amendment provides: The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.



The Fourth and Fifth Amendments were described in *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct 524, 532, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life."

It is, however, quite apparent that, for a state to rely on such a right as the basis on which it claims the right to abridge speech, it would have to establish the privacy right concretely and demonstrate the harm that would occur were it not protected. Surely, it may not be permitted to protect any right of privacy simply as an abstract or philosophical concept. At a minimum, a state should be required to show specifically designated kinds, or at least magnitudes, of harm, or endangerment to individuals, here arrestees, by the mere receipt of certain information. That, then, is the scale against which any statute should measure the impact upon individuals of finding unsolicited mail in their mailboxes or unrequested callers on their telephones.

It is also the level of detriment or endangerment that is necessary to qualify as the "right of privacy (that) is . . . protected by the Constitution. As the Court made clear in *Roe v. Wade*, 410 U.S. 113, 145 (1973):

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific R. Co. v. Bottsford*, 141 U.S. 250, 251, 11 S.Ct 1000, 1001, the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. (Citations and brief discussions thereof omitted.)

These decisions make it clear that *only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty. . . are included in this guarantee of personal privacy.* (Emphasis added.)

Moreover, the Court has made it equally clear that the concept of "liberty" has not singled out other rights as candidates

for special protection. *Paul v. Davis*, 424 U.S. 693 (1976) (reputation or defamation violations have not been converted to constitutional rights of due process even where violated by the government).

Only certain activities within the imprecise definition of a "right of privacy" have received judicial protection. Such matters as those which relate to marriage, procreation, contraception, family relationships, and child rearing and education are the ones for which it has been held that there are limitations on the government's ability to substantively regulate conduct. *Id.* at 713. Absent an infringement of rights in those areas, one does not make out an intrusion into the sphere which is considered to be "private."

In *Lamont v. Comm'r of Motor Vehicles*, 269 F. Supp. 880 (S.D.N.Y.), *aff'd*, 386 F.2d 449 (2d Cir. 1967), *cert. den.*, 391 U.S. 915 (1968), an action was brought against the Commissioner of Motor Vehicles on the ground that the statute permitting the Commissioner to contract with the highest responsible bidder to furnish copies of records of all vehicle registrations was a violation of his "right of privacy" as well as the right of all those similarly situated, inasmuch as it subjected him to " 'considerable annoyance, inconvenience and damage . . . by reason of the large volume of advertising and crank mail and other solicitation to which he was subjected.' " *Id.* at 882. In finding the plaintiff's contentions "plainly unsubstantial," the court dismissed the complaint and stated:

The mail box, however noxious its advertising contents often seems to judges as well as other people, is hardly the kind of enclave that requires constitutional defense to protect "the privacies of life."

*Id.* at 883. Continuing, the court made the simple, yet obvious, and legally incisive statements:

The short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.

\* \* \*

In his contrary thesis, plaintiff proposes to stretch the constitutional dimensions of "privacy" far beyond any reasonably foreseeable limits the courts ought to enforce.

*Id.* at 883-84. Of special interest was the court's further observation:

Indeed, questions more troublesome than plaintiff's might arise if the State adopted a policy of "privacy" or "secrecy" with respect to such information.

*Id.* at 883. *See also Shibley v. Time Inc.*, 40 Ohio Misc. 51, 321 N.E.2d 791 (1974), *aff'd*, 45 Ohio App.2d 69, 341 N.E.2d 337 (Ohio Ct. App. 1975), in which a plaintiff's contention that he and other magazine subscribers had suffered an invasion of privacy by the rental of their names was rejected.

As has already been demonstrated, no harm, and much benefit, accompanies the use of marketing lists. There are no "victims". Marketing lists do not victimize — they are a tool to market products, sell ideas and raise funds and although not everyone will like the product, or accept the idea, or contribute money — few, if any, would feel victimized solely as a result of being asked.

The focus of any statute must be on true privacy questions and not based on nuisance and nuisance only. It is not necessary to elaborate here on the long list of items that people term a nuisance. Suffice it to say that the list is substantial and varies according to the irritation quotient of the person involved. Although there are some nuisances shared almost in unanimity by all, no such unanimity exists concerning the receipt of commercial messages.

To the contrary, the large number of mail order companies with growing lists of satisfied customers would indicate that

the nuisance level of direct marketing ranks far down the list of minor irritations, and to only a relatively small group of individuals. For every person who may be driven to distraction by the presence in his or her mail box of direct mail, there are many others who find such missives unobtrusive, interesting and useful or, at worst, conveniently disposable. In any event, those few who seriously do not wish to receive direct mail are protected by existing industry practices — DMA's Mail Preference Service and, for telephone, Telephone Preference Service, and individual mailer and telephone marketer name withholding and removal options.

#### **B. Section 6254(f)(3) Violates The Mandates of *Central Hudson***

In view of the public benefit and historical as well as legal precedents demonstrating the value and protectability of commercial speech, as well as the lack of any harm in the privacy context that results from commercial solicitation, there is no viable state interest to be achieved by Section 6254(f)(3). Sections I and II, *supra*. Moreover, if there were, the excessive measure of an outright prohibition cannot satisfy the First Amendment's requirements. In this case, the arrestees lose as well.

It is a well-established tenet of constitutional law that the First Amendment not only protects the speaker's right to be heard, but also guarantees the listener's right to receive information of interest.

Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.

*Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976); *see also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S.



60 (1983) (commercial speech is protected even where offensive to some).

In so holding, the Court laid down certain precepts delimiting governmental power to abridge commercial speech, at the same time precluding states from restricting commercial speech easily and excessively.

The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive. *Id.* at 564.

Subsequently, in *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989), the Court retreated slightly from its "least restrictive manner" requirement and held that a "narrowly tailored" requirement or the need for a "reasonable fit" must be satisfied instead. The Court made it clear that its test did not insist on the absence of any conceivable alternative that was less restrictive, but only that any regulation not burden speech more than is necessary to further the government's vital interest. That test, in turn, was itself reaffirmed. *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993).

However, there could be no more utter or discriminatory means to abridge commercial speech than a prohibition against using otherwise publicly available information for a commercial purpose. There is a constitutional violation, *a fortiori*, where as here that information is available only in one place. Such a ban, which provides no definition or specificity or identification of

the substantial state interest being asserted (beyond invocation of the buzzword "privacy"), and which promotes blanket restrictions, cannot be tolerated. Given that, as a general First Amendment proposition, a heavy burden of proof must be satisfied before protection can be diminished,<sup>9</sup> (*Shelton v. Tucker*, 364 U.S. 479 (1960); *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Beneficial Corp. v. FTC*, 542 F.2d 611 (3rd Cir. 1976), *cert. den.*, 430 U.S. 983 (1977); *Terry v. California State Bd. of Pharmacy*, 395 F. Supp. 94, 105 (N.D. Cal. 1975) (three judge panel), *aff'd*, 426 U.S. 913 (1976)), it can only follow that

9. In *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), the court dealt with a Massachusetts statute prohibiting corporations from making contributions or expenditures to influence the outcome of a referendum unless the question materially affected the property, business or assets of the corporation. Rejecting the need for this restriction on corporate speech, the court stated at page 786: The constitutionality of Section 8's prohibition of the "exposition of ideas" by corporations turns on whether it can survive the exacting scrutiny necessitated by a state imposed restriction of freedom of speech. Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, "the State may prevail only upon showing a subordinating interest which is compelling", *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) (other citations omitted) "and the burden is on the government to show the existence of such an interest," *Elrod v. Burns*, 427 U.S. 347, 362 (1976). Even then, the State must employ means "closely drawn to avoid unnecessary abridgement." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

In *Elrod*, 427 U.S. at 363, the court had written: It is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny. *Buckley v. Valeo*, 424 U.S. at 65-66; *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958). "This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct . . ." *Buckley v. Valeo*, *supra*, 424 U.S. at 65. Thus, encroachment "cannot be justified upon a mere showing of a legitimate state interest." *Kusper v. Pontikes*, 414 U.S. at 58. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. (Citations omitted.)



something more than an amorphous reference to "invasion of privacy" must be present before an agency of the state may abridge marketers' and consumers' freedom of speech.

Returning to the imperatives set forth by the Court in *Central Hudson*, a statute, in order to dam the free flow of commercial information, (1) must assert a substantial interest to be achieved by restriction on commercial speech and (2) must employ a regulatory technique that must not be disproportionate to that interest.

It is unclear what state interest would be advanced where a statute allows access to arrestee information for purposes of truly public disclosure, yet prohibits access by those who only would communicate with the arrestee. Such a statute does not provide a state interest basis for abridging commercial speech. If other bases exist that do, they must be singled out, and proposed restrictions refined and limited to only so much as would "directly advance the state interest involved." *Central Hudson* at 564. See also *Rubin v. Coors Brewing Company*, 514 U.S. 476 (1995).

It is clear that any across-the-board prohibition would be excessive, and, therefore, would fail to satisfy the constitutional requirements that a narrowly tailored restriction be used, and that it not be disproportionate to a specifically identified, substantial interest of the state. *Edenfield v. Fane*, 507 U.S. 761 (1993) (reaffirming the need to demonstrate the direct advancement of a substantial state interest).

Any argument that a state's imposition involves only "inconvenience" and not an abridgement has been rejected: "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to the government." *Lamont v. Postmaster Gen. of the United States*, 381 U.S. 301 (1965) (concurring opinion at 309).

The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive

and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

*Id.* at 308.

Again, under *Central Hudson's* standards of advancing a substantial state interest in a narrowly tailored manner, a statute may not perpetrate a blanket intrusion on addressees' rights to receive information, including commercial information.

... the statute under consideration, on the other hand, impedes delivery even to a willing addressee. In the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose.

*Lamont v. Postmaster Gen.* at 310.

As earlier discussed, there are many who want and enjoy receiving mail containing commercial information. Accordingly, any statute that in an across-the-board manner interferes with the First Amendment right to be a recipient of information via that medium cannot withstand constitutional scrutiny. It is, after all, the medium about which it has been said:

The United States may give up the post-office when it sees fit, but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues.

*United States ex rel. Milwaukee Soc. Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 437 (1921) (Justice Holmes, dissenting opinion).

Moreover, targeted direct mail solicitations which are not false or misleading may not be, consistent with the First Amendment, categorically prohibited by the state. *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988). Section 6254(f)(3) denies marketers the ability to get their messages to those who may be most interested. To argue that denial of access for commercial use does not prohibit speech ignores the reality that without such access the process fails because the marketer cannot otherwise ascertain the basis for the targeting (arrestee

status), and accessing the same person's identity elsewhere and in a different context lacks the pertinent (arrestee status) information.

But the First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable.

*Shapero* at 473-74.

The Court also observed that:

... the recipient of a letter and the "reader of an advertisement ... can 'effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes,' " ... A letter, like a printed advertisement ... can readily be put in a drawer to be considered later, ignored or discarded. ... [It is] conducive to reflection and the exercise of choice on the part of the consumer. ... Nor does a targeted letter invade the recipient's privacy any more than does a substantively identical letter mailed at large.

*Id.* at 475-76.

The Court also recognized that "merely because targeted, direct-mail solicitation presents [one] with opportunities for isolated abuses or mistakes does not justify a total ban on that mode of protected commercial speech". *Id.* at 476. In addressing the *Central Hudson* requirements, the Court reaffirmed:

And so long as the First Amendment protects the right to solicit ... business, the State may claim no substantial interest in restricting truthful and non-deceptive ... solicitations to those least likely to be read by the recipient.

*Id.* at 479.

Depriving marketers and arrestees of the ability to send and receive, respectively, information of interest to them fails under this Court's standards as articulated in *Central Hudson*.

### C. Section 6254(f)(3) Does Not Employ The Least Restrictive Measures

Federal statutes directly pertinent to direct marketers already have taken advantage of the industry precedent that requires one to honor consumer requests. See Cable Communications Policy Act of 1984, 47 U.S.C. § 551 (requiring notice of information practices to consumer and consumer's ability to opt out of the marketing process); *Scofield v. Telecable of Overland Park, Inc.*, 973 F.2d 874 (10th Cir. 1992); see also *Warner v. American Cablevision of Kansas City, Inc.*, 699 F. Supp. 851 (D. Kan. 1988); Video Privacy Protection Act of 1988, 18 U.S.C. § 2710 (requiring notice and opt out); Telephone Consumer Protection Act of 1991 (effective December 20, 1992), 47 U.S.C. § 227 (requiring notice and opt out); Driver Privacy Protection Act, 18 U.S.C. § 2721 (requiring notice and opt out). All of them allow a customer to "opt out" of the marketing process and not have his or her name transferred to other marketers. Section 6254(f)(3) short circuits that process, prevents marketers from communicating and denies arrestees the right to receive valuable information and to exercise their freedom of choice. The outright ban of Section 6254(f)(3) does not satisfy the least restrictive measures/narrowly tailored requirement of *Central Hudson*. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). Less restrictive measures are available. Petitioner cannot demonstrate satisfaction of the *Central Hudson* requirements. There is no paramount state interest being asserted and the restriction is excessive. Moreover, attempting to separate access from use is imaginary where, as here, there is a single source of the information and the use determines the content of the speech.

**CONCLUSION**

For the foregoing reasons, the decision of the United States Court of Appeals for the Ninth Circuit should, in all respects, be affirmed.

Respectfully submitted,

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**AMICUS CURIAE**

**BRIEF**

## **QUESTION PRESENTED**

Whether it violates the First Amendment for California, in the statutory scheme at issue in this case, to condition access to information on a speaker's expressive purpose?

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**STATEMENT OF INTEREST**

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with members in all 50 states.<sup>1</sup> WLF engages in litigation and the administrative process in a variety of areas. WLF devotes a substantial portion of its resources to promoting commercial free speech rights. To that end, WLF has appeared before this Court and other courts in numerous cases dealing with commercial speech issues, including, most recently, *Greater New Orleans Broadcasting Ass'n v. United States*, 119 S. Ct. 1923 (1999). See also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995).

**STATEMENT**

Section 6254(f)(1) of the California Government Code obliges every State and local law enforcement agency to "make public," without limitations pertinent here, the name, occupation, date of birth and physical description of every individual arrested by the agency as well as the date and time of the arrest, the nature of the charges, the circumstances surrounding the arrest, information regarding outstanding warrants and parole or probation holds, and

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the submission of this brief. Letters of consent to the filing of this brief from counsel for the parties have been filed with the Clerk of this Court.

other information.<sup>2</sup> However, in the name of protecting the "privacy" of arrested individuals, Section 6254(f)(3) specifies that the *address* of any individual arrested by the agency shall be released only to persons who declare under penalty of perjury that (1) they have requested the information solely for "scholarly," "journalistic," "political," "governmental," or investigative purposes, and (2) the information "shall not be used directly or indirectly to sell a product or service to any individual or group of individuals."

### SUMMARY OF ARGUMENT

Section 6254(f)(3)'s restrictions on the use of arrestee addresses violate the First Amendment.<sup>3</sup> This is not a statute that protects the privacy of arrestees but one that

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<sup>2</sup> Section 6254(f) specifies that "state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:

"(1) The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdiction and parole or probation holds."

<sup>3</sup> Contrary to Petitioner's brief, the constitutionality of Section 6254's restrictions on access to, or the use of, information regarding victims or witnesses is not at issue in this case.

blocks offers of legal and other assistance to arrestees in the wake of an arrest—simply because those offers propose a commercial transaction or otherwise are not expressly permitted. Section 6254(f)(3) allows "noncommercial" uses of an arrestee's address that can destroy an arrestee's privacy, but prohibits "commercial" uses that can help the arrestee in time of need. The statute's categorical preference for "scholarly," "journalistic," "political," "governmental," and investigative uses of arrestee addresses over uses that facilitate commercial speech is impermissible. For these and the other reasons set forth below, Section 6254(f)(3) violates the First Amendment.

1. Section 6254(f)(3) impermissibly favors "noncommercial" speech over "commercial" speech. The asserted governmental interest—protecting the privacy of arrestees—does not support the statute's differential treatment of "commercial" and "noncommercial" uses of arrestee address information. If anything, the "noncommercial" uses of an arrestee's address that are authorized by the statute pose a *greater* threat to the arrestee's privacy than the "commercial" uses that the statute prohibits. Section 6254(f)(3) thus suffers from the same constitutional defect as the newsrack ordinance invalidated in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). This Court invalidated that ordinance because the interests it was claimed to serve—aesthetics and safety—did not support the ordinance's distinction between newsracks containing commercial handbills and newsracks containing editorial material. If Section 6254(f)(3) required persons seeking arrestee addresses to swear that they would *not* use that information for "scholarly," "journalistic," or "political" purposes, but *only* to offer products and services for sale, the limitation would plainly be held to violate the First



Amendment. The same result must follow where "noncommercial" speech is favored over "commercial" speech.

2. Section 6254(f)(3) also discriminates impermissibly *within* the categories of "commercial" and "noncommercial" speech. Under the clause permitting "journalistic" uses of arrestee addresses, a newspaper may use an arrestee's address to obtain a circulation-boosting interview with the arrestee, his family, or his neighbors; but the same information may not be used by a lawyer to offer legal representation to the accused. Under the clause permitting "political" uses of arrestee addresses, a politician could hold a press conference in the neighborhood of the accused to excoriate the crime; but a religious institution may not use the same information "to provide comfort" to the accused, as Petitioner acknowledges (Pet. Br. 12), and a legal-aid clinic could not use the information to offer the accused even *free* legal assistance—because those are not purposes the statute permits.

Even if the government might withhold arrestee addresses altogether, the First Amendment prohibits the government from conditioning access to information within its control on a person's pledge to use that information only for officially approved expression. Such a condition violates the First Amendment's principle of "equal access" that must apply "once the government has opened its doors." *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring).<sup>4</sup> The State may not avoid its constitutional

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<sup>4</sup> In this case, the government *had* fully "opened its doors" to third parties seeking arrestee address information. It subsequently *changed* the law to bar access to persons whose expressive uses of this  
(continued...)

obligation of content-neutrality by "opening its doors" only to those who pledge in advance to use the information only for government-approved purposes. Section 6254(f)(3) impermissibly discriminates against expression on the basis of its content and overturns the longstanding rule that the government has no copyright in government information. Its discrimination is particularly egregious because it is the State, itself, that benefits when offers of legal assistance to an arrestee are curtailed.

3. Section 6254(f)(3) is not narrowly tailored to serve a substantial governmental interest. The "privacy" interest invoked by the State in this case—the supposed interest of an arrestee in not being *contacted* by anyone offering a product or service, regardless of the manner or timing of the contact or the nature of the proffered product or service—is not constitutionally substantial. The arrestee obviously has a compelling interest, which Section 6254(f)(3) completely ignores, in learning about the availability of legal and other assistance in the wake of an arrest, as well as other goods and services for which the arrest may indicate a need. This Court, on the other hand, has held that speech may be curtailed to protect a listener's privacy only if "substantial privacy interests are being invaded in an essentially intolerable manner." *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 541 (1980). There is nothing so inherently vexatious or injurious about a directed solicitation for goods or services, including offers of religious counseling or legal assistance, paid or unpaid, that could justify Section 6254(f)(3)'s blanket ban on the use of arrestee addresses for non-permitted purposes.

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<sup>4</sup>(...continued)  
information the government disapproved. See Pet. Br. 3-5.

Assuming that the government has a substantial interest in protecting arrestees from *some* targeted communications, that interest cannot support the permanent and unqualified ban on commercial and other uses of arrestee address information that Section 6254(f)(3) imposes. This Court has upheld prophylactic rules prohibiting lawyers from soliciting clients in person, or by direct mail in the immediate aftermath of an accident; but these rules were upheld on the basis of the causal link between the *particular* communication and the *particular* harm to be avoided, and these rules were no broader than necessary to avoid the harms in question. Section 6245(f)(3), by contrast, bars any use of arrestee addresses for commercial and other solicitations, without regard to the content of the solicitation, the time when the solicitation is made, or the manner in which the solicitation is made. Such a blunderbuss restriction on speech cannot be justified in the name of protecting an arrestee's "privacy."

## ARGUMENT

### I. SECTION 6254(f)(3) IMPERMISSIBLY FAVORS "NONCOMMERCIAL" SPEECH OVER "COMMERCIAL" SPEECH

This Court has squarely held that the First Amendment prohibits the government from treating "noncommercial" speech more favorably than "commercial" speech when interest the government purports to be serving is unrelated to any distinction between the two categories of expression. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). Section 6254(f)(3) suffers from this fundamental flaw. The State's asserted interest—protecting an arrestee's privacy—does not support the statute's differential treatment

of "commercial" and "noncommercial" uses of arrestee addresses.

Whether an individual's privacy is violated by a third party's use of an individual's address—and the extent to which the individual's privacy is violated—is not determined by whether the information is used for a "commercial" or "noncommercial" purpose. Having one's address appear on the front page of the local newspaper, or being paid a visit by Geraldo Rivera and a camera crew, is surely a *greater* insult to one's "privacy" than receiving an offer of legal services, drug abuse counseling, or driving lessons through the mail, as the courts below recognized. See 146 F.3d at 1140; 946 F. Supp. at 828. Section 6254(f)(3) thus "permit[s] a variety of speech that poses the same risks the Government purports to fear," while curtailing "messages unlikely to cause any harm at all." *Greater New Orleans Broadcasting Ass'n v. United States*, 119 S. Ct. 1923, 1935 (1999).<sup>5</sup>

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<sup>5</sup> Petitioner contends that Section 6254(f)(3) does not restrict speech but merely requires third parties such as Petitioner to discover arrestee address information through other sources. Pet. Br. 15; U.S. Br. 20. As the District Court recognized, however, Section 6254(f)(3) functions as a restriction on commercial speech because "[t]he government is the only source of this information and by statute is disseminating it to everyone except commercial users." 946 F. Supp. at 825 (emphasis omitted). Even if arrestee address information could be obtained through other sources, this Court has held that restricting one means of access to a speaker's audience is impermissible even if alternative means remain available. *Discovery Network*, 507 U.S. at 427 (citing *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60 (1983)); see also *Consolidated Edison*, 447 U.S. at 541 n.10 ("government may [not] justify a content-based prohibition by showing that speaker[s] have alternative means of expression"); *Linmark Assocs., Inc. v. Township of* (continued...)



Indeed, in view of the information about an arrestee that Section 6254(f)(1) *requires* to be made public without limitation (name, occupation, physical description, nature of charges, outstanding warrants, etc.), the real effect of Section 6254(f)(3) is not to protect an arrestee's "privacy" at all, but instead to prevent the individual from being contacted by those in a position to meet the individual's most urgent needs in the wake of an arrest.<sup>6</sup> Through Section 6254(f)(3), the State—which has arrested the individual—strengthens its own prosecutorial hand by limiting the individual's access to legal and other assistance, while simultaneously authorizing the dissemination of address infor-

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<sup>5</sup>(...continued)

*Willingboro*, 431 U.S. 85, 93 (1977) (alternatives to which sign ban relegated sellers, which entailed "more cost" to sellers and were "less effective" in reaching audience, were not constitutionally adequate). Similarly, even if arrestees have other means of identifying sources of legal and other assistance, it is no answer that the listeners' need for information "should cause them to take advantage of the alternative of digging it up themselves. We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by other means. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 n.15 (1976). Here, as in *Virginia Pharmacy*, "the recipient's great need for the information sought to be disseminated \* \* \* makes the \* \* \* First Amendment claim a stronger rather than a weaker one." *Id.*

<sup>6</sup> Petitioner contends that Section 6254(f)(3) protects arrestees from discrimination in hiring and access to credit. Pet. Br. 10, 31-32. This contention is fanciful because, notwithstanding Section 6254(f)(3)'s limitation on the use of *address* information, Section 6254(f)(1) requires the *names* of all arrestees to be made public.

mation for "noncommercial" purposes that will *maximize* the sacrifice of the individual's privacy.<sup>7</sup>

At best, Section 6254(f)(3) reflects the impermissible assumption that "commercial" uses of information are intrinsically less valuable than "noncommercial" uses and for that reason may be more readily restricted. This Court, however, has held that commercial speech may *not* be treated as categorically less "valuable" than noncommercial speech. The Court has stressed that an individual's interest in receiving commercial information "'may be as keen, if not keener by far, than his interest in the day's most urgent political debate,'" *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995) (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976)), and the Court has affirmed "the general rule that the speaker and the audience, not the government, assess the value of the information presented," *Edenfield v. Fane*, 507 U.S. 761, 767 (1993); see *Greater New Orleans Broadcasting*, 119 S. Ct. at 1935-36 (characterizing this "general rule" as a "presumption"). Accordingly, where—as here—the government undertakes to restrict speech in the

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<sup>7</sup> Cf. *Ficker v. Curran*, 119 F.3d 1150, 1156 (4<sup>th</sup> Cir. 1997) ("[W]hen the state itself is prosecuting a defendant, it cannot lightly deprive its opponent of critical information which might assist the exercise of even a qualified right.") (invalidating restriction on lawyer solicitation in traffic offense cases). Petitioner, the Los Angeles Police Department, is a welcome, if unexpected, champion of the privacy rights of arrestees. The District Court, noting that Section 6254(f)(3) was proposed by state and local law enforcement agencies and district attorneys' offices, suggested that the provision "may have been intended to prevent arrestees from obtaining counsel because law enforcement agencies find it easier to deal with arrestees who are not represented by counsel." 946 F. Supp. at 828-29 & n. 7.



name of a non-speech related interest such as "privacy," it may not treat commercial speech categorically as less "valuable" than noncommercial speech, or as intrinsically more invasive. See *Discovery Network*, 507 U.S. at 418-19, 424-28.<sup>8</sup>

Section 6254(f)(3) suffers from the same constitutional defect as the ordinance invalidated by this Court in *Discovery Network*, whose "major premise," like Section 6254(f)(3)'s, was that "commercial speech has only a low value" relative to noncommercial speech. 507 U.S. at 418-19. See also *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1518 (1996) (Thomas, J., concurring) (rejecting viewpoint that "commercial" speech is of "lower value" than "noncommercial" speech).<sup>9</sup> But just as a newsrack's affront to aesthetic values does not depend on whether it contains apartment listings or editorial matter, the sacrifice of an arrestee's privacy through the use of his or her address does not depend on whether the use is "commercial" or

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<sup>8</sup> Section 6254(f)(3) restricts commercial speech by prohibiting address information from being used for commercial purposes, but the address information, itself, is not intrinsically "commercial" speech. The "speech" that United Reporting publishes—that a particular person lives at a particular address—is simply "an unadorned, accurate statement." See *Rubin*, 514 U.S. at 494 (1995) (Stevens, J., concurring). The Ninth Circuit incorrectly concluded (146 F.3d at 1136-37) that United Reporting was engaged in "commercial speech" merely because it offers the address information for sale. See *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

<sup>9</sup> For example, Senator Peace, a proponent of the legislation quoted by the District Court, declared that, while arrestee address information was "justifiably public in many ways, the unsolicited direct mail advertisements are unwarranted." See 946 F. Supp. at 826.

"noncommercial." See also *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 71-72 (1983) (government's asserted interest in protecting the public from "offensive" speech did not justify differential treatment of commercial and noncommercial speech). The privacy interest asserted by the State is simply unrelated to any distinction between "commercial" and "noncommercial" speech. *Discovery Network*, 507 U.S. at 428, 430. The uses of address information that are allowed threaten the same harms as those claimed to be threatened by the uses that are disallowed.<sup>10</sup>

Petitioner attempts to rescue Section 6254(f)(3) from this infirmity by arguing that the statute reflects a "balance" between "maintaining individual privacy" and "fostering an informed public." Pet. Br. 2; *id.* at 32. This Court rejected a similar attempt to make a virtue out of statutory inconsistency in *Greater New Orleans Broadcasting*. There, the government sought to justify Section 1304's exemption for casino-gambling advertising by Indian tribes as enabling tribes to generate revenues dedicated to tribal welfare—even though the exempted advertising undercut the government's interest in reducing the social costs of casino gambling,

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<sup>10</sup> See also *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981) (city's interest in aesthetics and traffic safety did not justify distinction drawn by ordinance between commercial billboards, which were allowed, and noncommercial billboards, which were banned); *Carey v. Brown*, 447 U.S. 455 (1980) (state's interest in protecting residential privacy could not sustain statute permitting labor picketing but prohibiting non-labor picketing); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120 (1991) (distinction drawn by "Son of Sam" law between income derived from criminal's descriptions of his crime and other sources "has nothing to do with" State's interest in transferring proceeds of crime to victims).

which was the asserted justification for Section 1304's advertising restrictions. This Court rejected the government's proffered justification on the ground that such tribal advertising, whatever its benefits, presented the very same dangers as the speech that the restrictions imposed by Section 1304 were justified as a means of avoiding. 119 S. Ct. at 1934-35. So, here, the State's asserted interest in "fostering an informed public" cannot justify an exemption for "noncommercial" uses of arrest information that present the very same dangers to "privacy" that Section 6254(f)(3)'s restrictions on "commercial" uses are intended to prevent. The statute's distinction between "commercial" and "noncommercial" uses of arrest information "distinguishes among the indistinct" (*id.* at 1935) and "makes no rational sense" if the State's "true aim" is to protect an arrestee's privacy. *Rubin*, 514 U.S. at 488.

Ironically, the "balance" purportedly struck by Section 6254(f)(3) completely fails to take into account the *arrestee's* interest in being "informed" about the availability of assistance that may be needed in the wake of an arrest. An arrestee's interest in hearing from those able to provide such assistance is certainly more immediate and compelling than the public's interest in learning where the arrestee lives by reading about it in newspapers or viewing it on the evening news. In the name of protecting the arrestee's "privacy," Section 6254(f)(3) keeps the *arrestee* in the dark about the availability of urgently needed services. No weight at all was placed on the arrestee's interest in learning about the availability of such services. Instead, Section 6254(f)(3) treats the arrestee's interest in such knowledge as non-existent, and the fact of the speaker's commercial motive as both controlling *and* fatal. This hierarchy of values is contrary to this Court's commercial speech decisions. *Cf.*

*Greater New Orleans Broadcasting*, 119 S. Ct. at 1930 ("even if the [speaker's] interest in conveying these messages is entirely pecuniary, the interests of, and benefits to, the audience may be broader") (citations omitted).

Petitioner argues that the government should not be forced to choose between allowing unrestricted use of arrestee address information, on the one hand, and forbidding any use of arrestee address information, on the other. Pet. Br. 10; *see* U.S. Br. at 12, 33. That choice, however, is compelled by the First Amendment's requirement of content-neutrality. *See Discovery Network*, 507 U.S. at 427-28 (content-neutrality between "commercial" and "noncommercial" speech must be observed "even if we assume, arguendo, that the city might entirely prohibit the use of newsracks on public property," for "as long as this avenue of communication remains open, these devices continue to play a significant role in the dissemination of protected speech").

## II. SECTION 6254(f)(3) IMPERMISSIBLY DISCRIMINATES WITHIN THE CATEGORIES OF COMMERCIAL AND NONCOMMERCIAL SPEECH

It would be bad enough if Section 6254(f)(3) only favored "noncommercial" speech, as a category, over "commercial speech," as a category.<sup>11</sup> But Section

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<sup>11</sup> The United States argues that Section 6254(f)(3)'s discrimination between "commercial" and "noncommercial" speech is not subject to heightened scrutiny because it involves "no question of distinctions based upon viewpoint." U.S. Br. 11. But "the First Amendment means that  
(continued...)



6254(f)(3) also discriminates *within* the categories of "commercial" and "noncommercial" speech. Section 6254(f)(3) permits the use of address information in the preparation of articles and research that help sell newspapers ("journalistic" purposes) and books ("scholarly" purposes). These uses not only sell "products" but are generally intended to produce a profit.<sup>12</sup> Section 6254(f)(3) also permits the use of address information by licensed investigators, who normally are paid for their work.

What Section 6254(f)(3) *prevents* are uses of address information that involve offers of goods and services *to arrestees*. A newspaper may use address information to arrange a circulation-boosting interview with the prime suspect in a sensational crime, but a driving school may not use address information to contact individuals whose arrests for traffic offenses suggest that they may have an interest in improving their driving skills.

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<sup>11</sup>(...continued)

government has no power to restrict expression because of its message, its ideas, its subject matter, *or its content*." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (emphasis added); *Consolidated Edison Co.*, 447 U.S. at 537 (invalidating viewpoint-neutral agency order that allowed utility bill inserts to present information on some subjects, but not to address public controversies); *Discovery Network*, 507 U.S. at 428-29 (invalidating ordinance that banned commercial newsracks but allowed noncommercial newsracks because, "by any commonsense understanding of the term, the ban is content based" and the city had failed to offer any justification for the ordinance that was "content neutral").

<sup>12</sup> Cf. J. Boswell, *Life of Samuel Johnson* LL. D. 302 (R. Hutchins ed. 1952) ("No man but a blockhead ever wrote, except for money.") (quoted in *United States v. National Treasury Employees Union*, 513 U.S. 454, 469 n.14 (1995)).

Similarly, Section 6254(f)(3) does not permit all *noncommercial* uses of arrestee address information. As Petitioner acknowledges, a political reformer may use arrestee address information to garner support for a campaign against "police brutality" (Pet. Br. 13), but a religious organization may not use the same information "to provide comfort" to the accused (*id.* at 12).

Petitioner insists that Section 6254(f)(3) does not "deny a benefit to any \* \* \* organization because that organization engages in disfavored speech" (Pet. Br. 11), but that is precisely what the statute does. The "benefit" at issue here—use of the addresses of individuals arrested by State and local law enforcement agencies—is available *only* to persons and groups who pledge to use that information *only* for communications approved by the State and who forswear uses disapproved by the State. This constitutes censorship, which the First Amendment forbids.

Indeed, Section 6254(f)(3) functions as a form of prior restraint, circumscribing the purposes for which information made available by the government is permitted to be used. Section 6254(f)(3) is particularly egregious because it handicaps arrestees in criminal cases in which the State, itself, is a party. This aspect of the statute invites the concern that "the stated interests are not the actual interests served by the restriction." *Edenfield*, 507 U.S. at 768.<sup>13</sup>

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<sup>13</sup> Petitioner's rhetoric-laden brief also implies that there is something improper about a business such as United Reporting meeting the market's demand for information available from the government. But Petitioner never explains why, if it is "exploitation" for United Reporting to facilitate contacts between an arrestee and defense lawyers (continued...)



### III. SECTION 6254(f)(3)'S PERMANENT AND UNQUALIFIED BAN ON THE USE OF ADDRESS INFORMATION IS NOT NARROWLY TAILORED TO SERVE A SUBSTANTIAL GOVERNMENTAL INTEREST

The government's asserted interest in protecting the "privacy" of arrestees cannot support the permanent and unqualified ban on the commercial use of arrestee addresses that Section 6254(f)(3) imposes. This Court has stated that "the ability of government 'to shut off discourse solely to protect others from hearing it [is] dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.'" *Consolidated Edison Co.*, 447 U.S. at 541 (citation omitted); *see also Edenfield*, 507 U.S. at 769 (government may intervene where solicitation is pressed with "such frequency or vehemence as to intimidate, vex, or harass the recipient") (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 462 (1978)). Applying that principle, the Court has upheld a Florida bar rule prohibiting direct-mail solicitations of victims in the immediate aftermath of accidents, finding that such solicitations—by reason of their particular content and their particular timing—are an invasion of privacy that cause their recipients "substantial injury." *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 627-32 (1995).

But the Court has not upheld restrictions on communications directed to the home—even targeted direct-mail

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<sup>13</sup>(...continued)

(e.g., Pet. Br. 9, 13, 15, 21), it is not also "exploitation" for a journalist or scholar to use the same information to help sell newspapers or books, or for a politician to use this information to advance his or her career.

solicitations, *see Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988)—in the absence of a finding of such "concrete, nonspeculative harm." *Florida Bar*, 515 U.S. at 629. To the contrary, the Court has held that the government may not, in the name of protecting residential "privacy," prohibit visits by a door-to-door solicitor or communications by mail simply because the recipient might find the visits intrusive or the communications objectionable. *See Consolidated Edison Co.*, 447 U.S. at 542 & n.11 (billing inserts); *Martin v. City of Struthers*, 319 U.S. 141 (1943) (door-to-door solicitation); *see also Bolger*, 463 U.S. at 71-72 (direct-mail advertisements). The Court has rejected privacy justifications for limits on solicitation where those who are unreceptive can simply "terminate the call," *Edenfield*, 707 U.S. at 776, or throw the letter in the trash, *Bolger*, 463 U.S. at 72.

In contrast to the restriction upheld in *Florida Bar*, Section 6254(f)(3) prevents *all* solicitations to arrestees, regardless of what they offer and regardless of when or how they might be made, and the statute's restriction is permanent. Petitioner's ultimate justification for Section 6254(f)(3) is that an arrestee will experience "a sense of personal violation at the knowledge that [his or her] address and status as an arrestee \* \* \* is on numerous commercial mailing lists." Pet. Br. 31. But this is merely an ornate way of saying that an arrestee may find receiving a directed solicitation to be "embarrassing"—a justification this Court has repeatedly held is *not* sufficient to support limitations on commercial speech. *See Zauderer*, 471 U.S. at 648; *Bolger*, 463 U.S. at 71-72; *Carey v. Population Services International, Inc.*, 431 U.S. 678, 701 (1977). This Court has emphasized that "broad prophylactic rules may not be so lightly justified if the protections afforded commercial

speech are to retain their force." *Zauderer*, 471 U.S. at 649.<sup>14</sup>

Petitioner's claim that arrestees will experience such a sense of embarrassment is sheer assertion, which cannot justify a curtailment of commercial speech. *Edenfield*, 507 U.S. at 770-71 (State's burden of justification is not satisfied "by mere speculation or conjecture"; State "must demonstrate that the harms it recites are real"). It is at least equally likely that arrestees would *welcome*, and be *grateful* for, offers of legal or other assistance that may follow in the wake of an arrest. It does not appear that the Legislature, when it was considering Section 6254(f)(3), heard *any* complaints from individuals who actually had received directed solicitations following their arrest. See Pet. Br. 4. On the other hand, United Reporting produced "affidavits from many arrestees stating that they do not feel that the solicitations [barred by Section 6254(f)(3)] invaded their privacy and that they found them helpful in obtaining legal representation or other services," and Petitioner filed no contrary affidavits. 946 F. Supp. at 828. Petitioner also never explains how a person's supposed sense of "personal violation" at receiving a communication directed to him or

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<sup>14</sup> It is no coincidence that Petitioner has defined the relevant injury as the sense of "personal violation" that supposedly flows from being on a mailing list. That is, in fact, the *only* "injury" to privacy that Section 6254(f)(3) can be considered tailored to prevent. "The means fit the ends only because the ends were defined with the means in mind." *Members of the Los Angeles City Council v. Taxpayers for Vincent*, 466 U.S. 789, 826 (1984) (Brennan, J., joined by Marshall and Blackmun, JJ., dissenting). See *Amicus* Brief of New York at 15-16 (attempting to salvage Section 6254(f)(3) from underinclusiveness by arguing that the government is entitled to distinguish among "different types of privacy," "permitting the invasion of one type of privacy" while "avoiding infringements of other types").

her as an arrestee can be distinguished in any meaningful way from the person's sense of "personal violation" at having been arrested in the first place.<sup>15</sup>

Petitioner's professed desire to shelter arrestees from such hypothesized distress is insubstantial and cannot trump either an arrestee's *own* First Amendment interest in receiving offers of assistance that may be critical in the wake of the arrest, or a speaker's *independent* First Amendment interest in communicating with the arrestee.

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<sup>15</sup> Even if some arrestees might object to having their addresses provided to third parties, including potential legal and religious counselors, the State could protect their privacy by withholding the addresses of objecting arrestees. See *Consolidated Edison*, 447 U.S. at 542 n.11; *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728 (1970).

**CONCLUSION**

Wherefore, the judgment of the Court of Appeals should be affirmed.

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